The Federal Labor-Management

Consultant

1 FLMC 80-1

January 18, 1980

80/1

United States of America
Office of
Personnel Management

Route to:

NEWARK PUBLIC LIBRARY

New Developments Checklist

FLRA rules unions entitled to travel expenses . . . p. 1
Executive Order bars investigators from bargaining . . . p. 1
MSPB declares OPM removal regulations invalid . . . p. 1
Union proposals on implementation of management rights are negotiable unless management is stopped from acting at all . . . p. 1
Advisory arbitration utilized in discharge case . . . p. 2
FMCS case load shows marked increase in Federal sector . . . p. 3
FLRA appoints executive director . . . p. 4
19 NAGE units consolidated in VA . . . p. 4

FLRA Broadens Payment to Unions

Union negotiators are entitled to official time for all negotiations, not just for negotiation or renegotiation of a basic collective bargaining agreement. Agencies must also pay travel and per diem to employees who are union representatives when engaged in negotiations. This is the gist of a major policy statement issued by the Federal Labor Relations Authority.

Government workers who represent unions already get paid by their agencies for time spent in negotiation of new or renewed contracts, and unions can bring as many people to the bargaining table as represent management. The ruling entitles them to official time for midterm negotiations as well as new or renewed contract bargaining.

FLRA determined that the Federal Service Labor-Management Relations Statute "reflects the intent of Congress that the entitlement of official time under Section 7131(a) would encompass all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement."

Neither the statute nor its legislative history expressly speaks to the payment of travel expenses. But since the law says that collective bargaining "contributes to the effective conduct of public business" and is "in the public interest," the Authority concluded that employees negotiating as union representatives on paid time are "clearly engaged on official business for the Government," and therefore entitled to transportation and per diem. (2 FLRA No. 3')

New Executive Order Excludes Intelligence, Investigative Units

On November 19, 1979 President Carter, under the authority of the Federal Service Labor-Management Relations Statute, issued Executive Order 12171 which for national security reasons excludes certain agencies, activities and installations from coverage of the act.

Pm 1-13-

Among those excluded are intelligence, investigative and security agencies of the Departments of Defense, Energy, Justice and Treasury, Agency for International Development, General Services Administration and the Library of Congress. The Order also excepts from coverage units of the Drug Enforcement Administration located outside the U.S., in addition to certain domestic units of DEA.

Jobs in Jeopardy

According to a 52-page decision handed down by the Merit System Protection Board, Federal agencies cannot discharge or demote employees for unacceptable performance under the Civil Service Reform Act's new streamlined procedures unless OPM-approved performance appraisal systems have been established. Before taking such removal or demotion actions, agencies must establish the systems and clearly communicate the standards and critical elements to employees affected by them.

The Board's decision was in response to charges filed by the American Federation of Government Employees challenging the firing of employees at the Social Security Administration last year.

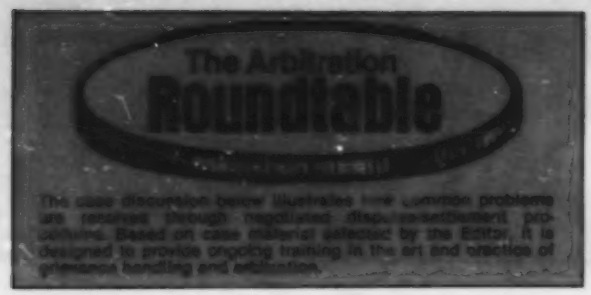
Office of Personnel Management Director Alan K. Campbell expressed pleasure that the MSPB decision allows agencies to adopt performance standards tailored to each individual's job, and requires that poor performers prove that errors made in filing organizations must be "harmful to their cases." Campbell strongly disagreed with the part of the decision overturning OPM regulations which permit agencies to take immediate action against poor performers. OPM will appeal the MSPB decision to the U.S. Court of Appeals. (MSPB Order No. RR-80-3, Wells vs. Harris—December 17, 1979)

Negotiability Issue Expanded

The Federal Labor Relations Authority has ruled that union proposals on implementation of reserved management rights are negotiable unless the procedures prevent management from acting at all. The American Federation of Government Employees' proposal to Fort Dix would prohibit management from taking any disciplinary suspension or removal action until a grievant exhausts the contractual review procedures and a final determination is rendered.

The Authority rejected management's argument that the proposed procedures would unreasonably delay its statutory right to suspend or discharge employees.

(Continued on page 4)



This case discussion below illustrates how common problems are resolved through negotiated dispute-settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

Burden of Proof

Casefacts: Under the 1976 contract between a Social Security Administration regional office and a council of American Federation of Government Employees, an employee threatened with adverse action has the option of using advisory arbitration or the agency's formal review procedures. In this case, the employee chose the advisory arbitration route to protest his dismissal.

The grievant, a telephone service representative trainee, had been on the job for three years. His work entailed answering phone inquiries from the public, helping new applicants, assisting when checks were lost, etc.

Concerned over the trainee's work, management formally admonished him, issued a letter of reprimand, and twice denied in-grade increases. The employee filed grievances on the admonishment and the reprimand. Management denied the grievances, which were not processed to arbitration.

Almost a year later the activity put the employee on 30 days notice of his discharge for poor work performance and failure to accept counseling and instructions from supervisors.

The dismissal letter went into lengthy detail on the employee's deficiencies over a one year period and listed 24 work errors. It also cited seven incidents demonstrating the employee's alleged inability to deal tactfully with the public, coworkers and supervisors. One incident had caused the admonishment and another the reprimand.

The first incident concerned a mother with four children who phoned in a change of address. The grievant misinformed the woman on procedures, lectured her on her responsibilities, and instructed her to open a savings account.

Management charged that this and other episodes not only generated complaints about the SSA but might result in erroneous cutoff of payments to needy beneficiaries. According to management, it had expended a great deal of energy and effort in hopes of helping the employee.

In rebuttal AFGE argued that management's investigation was not conducted fairly or completely and did not meet the burden of proof. The union charged that management was "incompetent, inconsistent, irresponsible, arbitrary and capricious" toward its responsibility for living up to contractual demands.

Issue: Was management's proposed discharge of the grievant for just and sufficient cause? If not, what was the arbitrator's recommended remedy?

Advisory Award: Management's proposal to discharge the grievant was not for just and sufficient cause within the meaning of the contract, determined Arbitrator G. Alan Dash, Jr. The record did not sustain the jump from a letter of reprimand to a discharge, and management should try one more interim step. Accordingly, Arbitrator Dash recommended that management cancel the discharge and instead suspend the grievant for 30 days. (The SSA implemented his recommendations.)

Before rendering his advisory opinion, the arbitrator observed that the union made serious mistakes in its presentation: "A good defense of a grievant in a discharge case is not well founded in a strong attack upon every member of management or supervision . . . If the employee continues to work, his future work is made much more difficult."

Another element disturbing to the arbitrator was the union's inclusion, in its post-hearing brief, of evidence which came into being after the closing of the hearing. This inclusion "is totally incorrect and a gross misuse of the arbitration process," noted Dash. If the union wanted to apprise the arbitrator of such evidence, it should have sought to reopen the hearing.

Dash threw out two of the incidents listed among management's reasons for discharge because they were the basis for the earlier admonishment and reprimand. "To use a single incident twice as a cause for discipline," he wrote, "constitutes double jeopardy."

In looking at the 24 errors, Dash found most were uncovered during a 100 percent check of the grievant's work from September 1977 to May 1978. Because other representatives might make just as many mistakes under a 100 percent review, the arbitrator questioned whether the specifics of errors should constitute a significant portion of the discharge letter. With 800 to 1,000 calls handled monthly, he did not find excessive 24 errors over eight months. (Social Security Administration, Bureau of District Office Operations, New York Region *and* American Federation of Government Employees New York-New Jersey Council—June 28, 1979. LAIRS No. 20357)

Mediation and Arbitration in the Federal Service

The following information about mediation and arbitration in the Federal government is taken from the Annual Report of the Federal Mediation and Conciliation Service Fiscal Year 1978.

The FMCS Federal sector caseload continues to surge ahead, accounting for 341 joint meeting dispute cases closed during FY 1978. These 341 cases represent a 16 percent increase over the 287 Federal cases closed the previous year.

The total Federal caseload (both joint and nonjoint meeting dispute cases closed) handled in FY 1978 was even higher, 359 cases, with the Department of Defense and its agencies drawing the most attention from mediators.

Working conditions was the issue most often in dispute, stirring debate in almost half the cases entered into by mediators. Other issues of primary importance were management prerogatives, grievance procedures, duration of the contract, and hours of work and overtime.

FMCS also gathers overall data on the cost of key elements in the arbitration process. The time charged by arbitrators for travel, hearings and study exceeded three days for the first time in almost a decade. In FY 1970, the time per case was 2.93 days, and in 1978, 3.09 days.

The increase in time was partially responsible for a 13.3 percent increase in costs of arbitration. As shown below, the average cost was $830.54 in FY 1978 as compared to $733.04 in FY 1977.

Mediation cases by Federal agency for fiscal year 1978

Agency	Number of cases	Percent of total
Dept. of the Army	75	13.9
Dept. of the Navy	67	12.4
Dept. of the Air Force	67	12.4
Veterans Administration	60	11.1
Health, Education and Welfare	49	9.1
Dept. of the Treasury	36	6.7
Dept. of Agriculture	30	5.6
Dept. of Defense	23	4.3
Dept. of the Interior	21	3.9
General Services Admin.	19	3.5
National Guard	17	3.2
Dept. of Transportation	11	2.0
Dept. of Justice	10	1.9
Dept. of Housing and Urban Development	10	1.9
Dept. of Commerce	6	1.1
National Labor Relations Board	4	0.7
Others	34	6.3
Total	539	100.0

Frequency by percentage of issues in Federal negotiations in fiscal years 1977 and 1978*

Issue	FY 77	FY 78
Wages	7%	6%
Union security	18	17
Seniority	18	17
Grievance procedures arbitration	41	33
Guarantees	16	15
Vacations, holidays	6	6
Hours, overtime	27	24
Pension—insurance	2	3
Management prerogatives	41	37
Duration of contract	31	26
Job classification	20	16
Working conditions	48	49
Other	31	29

*Based on 287 cases in FY 77, 341 in FY 78.

Average per diem rates, fees and expenses charged by arbitrators based on closed arbitration award cases sampled for fiscal years 1970 through 1978*

Arbitrators' per diem rates, fees and expenses charged	1970 Dollar amount	1971 Dollar amount	1972 Dollar amount	1973 Dollar amount	1974 Dollar amount	1975 Dollar amount	1976 Dollar amount	1977 Dollar amount	1978 Dollar amount	1978 Percent change from FY 77
Per diem rate	$156.83	$163.88	$172.53	$176.32	$180.72	$192.30	$202.37	$216.99	$239.05	10.2
Total charged	539.88	566.59	590.12	596.77	601.33	621.31	662.39	733.04	830.54	13.3
Amount of fee	457.97	480.88	510.52	520.40	529.55	550.81	581.72	644.70	735.53	14.1
Amount of Expenses	81.91	85.71	79.60	76.37	71.78	70.50	80.67	88.34	95.00	7.5

*Based on sample of cases: for 1970, 722 cases; for 1971, 719 cases; for 1972, 850 cases; for 1973, 870 cases, for 1974, 742 cases; for 1975, 444 cases; for 1976, 525 cases; for 1977, 574 cases, and for 1978, 692 cases.

(Continued from page 1)

The Authority's decision represents a reversal of the former Federal Labor Relations Council's position that bargaining on a reserved right cannot unreasonably delay implementation so as to negate a management decision.

In reaching its conclusion the Authority relied heavily on its interpretation of the legislative history of the Federal Service Labor-Management Relations Statute: "The only foreseeable effect of this procedural requirement upon the exercise of the statutory management rights involved is the possibility of delay, .and Congress rejected the standard of unreasonable delay' as the sole basis for excluding proposed procedures from negotiations." FLRA noted that its decision represents no judgment as to the proposal's desirability.

A second issue in the Fort Dix case was AFGE's proposal that would prevent management from regularly assigning duties not reasonably related to the job description. The Authority upheld the negotiability of this proposal and found no violation of the management rights section of the act.

In the Authority's view, the proposal concerns management's use of employee position descriptions in connection with the assignment of work rather than the assignment of work itself. If an agency decided to add unrelated duties to be performed regularly to a position, it would need to change the position description in order to do so. (2 FLRA No. 16—November 29, 1979)

Similar Proposal by NTEU

In a separate but somewhat similar case, a National Treasury Employees Union proposal would stay suspension of disciplinary action in the U.S. Customs Service until the grievance procedure is exhausted. However, this stay of management action could not exceed 50 days. The Authority upheld negotiability of the proposal. (2 FLRA No. 15—November 29, 1979)

FLRA Names Executive Director

The Federal Labor Relations Authority has appointed **Samuel A. Chaitovitz** as its Executive Director. Mr. Chaitovitz will have broad responsibility for the management and operation of the agency in carrying out its function to administer the Federal Service Labor-Management Relations Statute. Prior to his appointment he served as Chief of the Authority's Representation and Unfair Labor Practice Division.

Mr. Chaitovitz joined the Authority as Administrative Law Judge, a position he had held with the Department of Labor. His previous work was with the National Labor Relations Board and in private law practice.

Consolidation at VA

The Federal Labor Relations Authority has upheld a National Association of Government Employees' request for consolidation of some of its bargaining units at the Veterans Administration. NAGE holds exclusive recognition for 19 units of nonprofessional employees at VA's Department of Medicine and Surgery. The union sought consolidation under Executive Order 11491, and the Assistant Secretary for Labor-Management Relations had approved the union's request.

Opposing the consolidation, the VA petitioned the Authority for review of the A/SLMR's decision. The agency contended that the proposed unit was inappropriate because it did not meet the criteria under Section 10(b) of the Order and NAGE did not exclusively represent a majority of all employees within the agency or primary national subdivision. The Department of Defense, General Services Administration and the Office of Personnel Management filed *amicus curiae* briefs in support of the VA position.

The Authority, in concurrence with the A/SLMR, found that the consolidation fulfilled the Order's criteria for unit determination. The Authority reiterated its view, previously expressed in 1 FLRA No. 55, that consistent with the former Federal Labor Relations Council's clear policy guidelines there is a presumption favoring the appropriateness of consolidated units.

Its decision, the FLRA noted, was made solely on the basis of the Order and does not prejudge the meaning or application of related provisions under Title 5, U.S. Code, Chapter 71. (2 FLRA No. 25—December 7, 1979)

Consultant

Published biweekly by the U.S. Office of Personnel Management. Editorial inquiries should be addressed to Editor, **The Consultant,** Office of Labor-Management Relations, Room 7508, 1900 E Street, N.W., Washington, D.C. 20415. Phone (202) 632-9722.

All Federal departments and agency headquarters may order the **Federal Labor-Management Consultant** by sending a printing and binding requisition to the Government Printing Office, referencing OPM printing requisition No. 80-34. Individuals may subscribe through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, at $16.00 per year ($20.00 foreign). Make checks payable to the Superintendent of Documents.

Unless otherwise specified, materials in this publication do not represent expression of official policy. Section numbers cited are taken from Title V, U.S. Code, Part III, Subpart F, Chapter 71, Subchapter I—IV. Use of funds for printing this publication has been approved by the Office of Management and Budget through March 1, 1980.

The Federal Labor-Management

Consultant

FLMC 80-2

February 1, 1980

United States of America
Office of
Personnel Management
Route to:

New Developments Checklist . . .

Grievance procedures predating CSRA remain valid, but are negotiable upon demand of either party . . . p. 1
OPM issues regulations on agency grievance procedures . . . p. 1
FLRA rules that part of NTEU proposal is negotiable, part is non-negotiable . . . p. 1
Management found remiss in posting of job vacancy and notification of supervisors . . . p. 2
Map of FLRA regional structure . . . p. 3
FAA not guilty of unfair labor practice in PASS case . . . p. 4
Pay for working out of class found negotiable subject . . . p. 4

Scope of Grievances Is Renegotiable

In a recent policy statement the Federal Labor Relations Authority gave the green light to renegotiation of existing grievance procedures which were negotiated prior to enactment of the Federal Service Labor-Management Relations Statute.

The Authority concluded that where either union or management objects to the renewal or continuation of these grievance procedures in a labor contract, the parties must renegotiate the scope of the procedures.

Former Executive Order 11491 limited the scope of areas which could be covered by a contractual procedure, whereas the new statute considerably broadens the potential scope of coverage. Consequently, most Federal sector labor agreements negotiated prior to the statute contain grievance procedures narrower than the "full scope" now permitted by the statute.

The FLRA interpretation does not permit automatic widening of grievable areas; it requires the dissatisfied party to call for reopening of negotiations on this subject. Or, if both parties so desire, the old grievance procedure can be retained.

The policy statement also rules on binding arbitration. The statute mandates the provision of binding arbitration as part of the grievance procedure. If an existing negotiated grievance procedure does not provide for binding arbitration and either party wants it, then binding arbitration must automatically be included, says the FLRA. (2 FLRA No. 32—December 19, 1979)

OPM Issues Agency Grievance Regulations

The Office of Personnel Management's final regulations on agency administrative grievance systems, 5 CFR Part 711, allow agencies to extend coverage of agency procedures to bargaining unit employees under certain circumstances. Under 5 USC 7121, unit employees generally must use their negotiated grievance procedure for matters covered by the procedure. There may, however, be other matters which the union and the agency agreed to exclude from coverage of the negotiated procedure.

OPM regulations allow an agency to extend the coverage of its grievance procedure to such employees when negotiated procedures are not available for reviewing the matter. Inclusion of bargaining unit employees is left to the discretion of the agency. All actions must be consistent with the provisions of the Federal Service Labor-Management Relations Statute. (See *Federal Register*, December 31, 1979, p. 77127.)

NEWARK PUBLIC LIBRARY
FEB 2 2 1980
U.S. GOVT. PUBS.
DEPOSITORY 349

Grade Expectations

A union's labor contract proposal found non-negotiable by the Internal Revenue Service has been reviewed by the Federal Labor Relations Authority. The Authority ruled that the first sentence of the National Treasury Employees Union's proposal is negotiable but that the second violates management's reserved rights.

The first sentence would require IRS to *announce* a certain percentage of total available vacancies in each appointing office as upward mobility positions. The agency contended that this could cause unreasonable delay and negate its rights in the event management decided to *fill* the positions as other than upward mobility positions or not to fill them at all.

But citing its earlier decision in a similar case (2 FLRA No. 16), the Authority determined this sentence negotiable under Section 7106(b)(2) of the Federal Service Labor-Management Relations Statute. According to the FLRA, this part of the proposal would not prevent the agency from acting at all to exercise its statutory right to fill or not fill vacant positions. It would only establish a procedural requirement that a certain number of vacant positions be *announced* as upward mobility positions.

The second sentence of the proposal would require management to fill certain percentages of such vacancies in accordance with conditions set forth in the proposal. This sentence, in the Authority's judgment, violates management's rights to hire and assign employees under Section 7106(a)(2) of the Statute.

Although NTEU argued that it did not intend the second part to require the agency to fill positions, the

(Continued on page 4)

PM 1.13:

The case discussion below illustrates how common problems are resolved through negotiated disputes-settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

The Curious Case of the Missing Announcement

Casefacts: At Aberdeen Proving Grounds, regulations require management to post job vacancies and to spread the word to interested employees. APG's contract with the Machinists mandates posting for ten days.

When a vacancy for boiler plant equipment mechanic was posted on January 17, 1979, three people applied. All three were rated, and a register established on March 16. That same day two vacancies were added to the one previously announced. On March 23 the three applicants were selected to fill the three vacancies.

A boiler fireman who had been watching the bulletin board for announcements saw no posting for the mechanic vacancy, nor did his supervisor tell him about it. It was not until the end of March, after the applicants were selected, that he learned of the vacancies. The fireman grieved, alleging that management violated the contract by not giving him an opportunity to apply for the job. In September his case went to arbitration.

Management protested that the announcement was posted in the main building, where the fireman was likely to see it, and other locations. In addition the boiler plant chief routinely told supervisors "to make sure everyone knows" about vacancies.

At the hearing there was evidence that the grievant's supervisor was not aware of the vacancy. A witness testified that the supervisor stated emphatically that the announcement had not been posted. Management conceded that there had been problems in the past with missing announcements. In fact, there were "quite a few times" that announcements had disappeared.

It was undisputed that the grievant was an exemplary employee, and that if he had applied he would have been selected for one of the vacancies.

Management was willing to give the grievant priority consideration for the next such vacancy. But management argued that it had met requirements by *properly posting the notice, and that at least at other* locations it had been up for ten days.

Issue: Was management deficient in failing to post the announcement and in failing to bring the vacancy to the attention of employees? If "yes," should the positions be vacated and the grievant be considered before anyone else was placed in any one of those vacated positions?

Award: Arbitrator Robert J. Ables found it difficult to fault the agency because "a fair inference may be drawn that one of the interested applicants for the job took down the announcement immediately after it was posted."

Nevertheless, an announcement must be posted on an official bulletin board to give interested employees an opportunity to learn about new job openings. There is a further obligation on the employer to make sure that interested employees are made aware of the vacancy.

The evidence established convincingly that the announcement was not posted for the required time and thus the agency did not comply with the contract or its own regulations on posting. More importantly, supervisors who should have known about the job openings were not informed and could not advise their employees.

On the basis that the boiler plant chief knew of problems with announcements being taken down in the past and evidence that the supervisor had not seen the announcement or been told of it, it follows that management had not technically satisfied the contract or its regulations.

Arbitrator Ables stressed that he found no bad faith in this failure on management's part and that important credit must be given to the agency for granting priority consideration to the grievant for the next vacancy. Nevertheless, he said, the grievant understandably does not wish to take his chances on such priority consideration, even though the employer estimates there will be four or five vacancies in the next few months.

In recognition of management's efforts to alleviate any harm done to the grievant and because the question might be academic within the next few months, Ables told the agency to post a new announcement to open a register to include the three jobs awarded in March if by December 15, 1979 the grievant has not been given an opportunity to exercise his priority consideration for a vacancy.

In the event such a new register is required, the agency shall rate and select applicants from off that register for the original three jobs. However, the arbitrator concluded, the present incumbents may hold their jobs so long as the agency acts in good faith to complete the processing of applicants off the new register for such jobs. (Aberdeen Proving Ground Command *and* International Association of Machinists Lodge 2424—October 10, 1979. LAIRS 12219)

Regional Structure of FLRA

Region I 441 Stuart Street, 8th Floor
Boston, Massachusetts 02116
FTS: 223-0920
Comm: (617) 223-0920

Region II 26 Federal Plaza, Room 241
New York, New York 10007[1]
FTS: 264-4934
Comm: (212) 264-4934

Region III 1730 K Street, NW., Room 401
Washington, D.C. 20006
FTS: 653-7213
Comm: (202) 653-7213

Region IV 1776 Peachtree Street, NW.
Suite 501, North Wing
Atlanta, Georgia 30309
FTS: 257-2324
Comm: (404) 881-2325

Region V 219 S. Dearborn Street, Room 1638
Chicago, Illinois 60604
FTS: 353-6746
Comm: (312) 353-6746

Region VI Downtown Post Office Station
Bryan and Ervay Streets
P.O. Box 2640
Dallas, Texas 75221
FTS: 729-4996
Comm: (214) 767-4996

Region VII City Center Square, Suite 680
1100 Main Street
Kansas City, Missouri 64105
FTS: 758-2199
Comm: (816) 374-2199

Region VIII World Trade Center
350 S. Figueroa Street, 10th Floor
Los Angeles, California 90071[2]
FTS: 798-3805
Comm: (213) 688-3805

Region IX 450 Golden Gate Avenue, Room 11408
P.O. Box 36016
San Francisco, California 94102[2]
FTS: 556-8105
Comm: (415) 556-8105

[1] New York includes the following counties: Ulster, Sullivan, Greene, Columbia and all counties south thereof. All counties in New York state north thereof are in the jurisdiction of Boston.

[2] San Francisco includes the following California counties: Monterey, Kings, Tulare, Inyo, and all counties north thereof. All counties in California south thereof are in the Los Angeles jurisdiction.

READEX FICHE

(Continued from page 1)
Authority found the wording "could be required to fill" expressly required management action in violation of the statute. (2 FLRA No. 33—December 21, 1979)

No Mail Chauvinism Found

In concurrence with its Administrative Law Judge, the Federal Labor Relations Authority dismissed an unfair labor practice complaint against the Federal Aviation Administration. At issue was a charge by the Professional Airway System Specialists (PASS) that the FAA restrained the delivery of mail sent by the union to employees at FAA units, thus denying access to employees.

PASS sought to represent 8,000 employees at Airways Facility units, 80 percent of whom were already represented by other unions. To call for a representation election, PASS needed a 30 percent show-of-interest cards signed by employees.

The specialists were geographically scattered around the country at 95 facilities. After a limited attempt to reach them by telephone, PASS decided to use the mails. In September 1977 the union mailed 8,000 first class letters to employees at their work stations.

FAA refused to allow distribution of PASS letters through the agency's internal mail delivery system and marked 2,500 envelopes "return to sender."

PASS charged that the agency frustrated its attempt to solicit the signatures necessary to challenge the incumbent unions.

FAA argued that its directives prohibit distribution of union literature through the agency system. Only in special circumstances, where a union shows that it has no practicable means of communication with employees, would the agency grant permission for such distribution. PASS made no effort to tell its difficulty to the agency.

An additional FAA consideration was that other unions held exclusive representation.

The Authority dismissed the union's complaint. It found that no question of representation existed, since PASS did not have equivalent status with other unions, and there was no disparity of treatment by the agency. PASS had not exhausted reasonable efforts to communicate with employees other than by mailing, nor had it asked the FAA to authorize use of the internal mail system.

Because the unfair labor practice charge was filed under former Executive Order 11491, the Authority based its decision on case law under the Order. Its ruling, the Authority noted, would not prejudge the meaning and application of related provisions under the new Federal Service Labor-Management Relations Statute. (2 FLRA No. 48—December 31, 1979)

Pay for Working Out of Class

The Federal Labor Relations Authority has found negotiable a union proposal for higher pay for employees temporarily assigned to higher grade jobs. Management had alleged that the proposal was nonnegotiable because it involved procedures for filling threshold supervisory positions outside the bargaining unit. The proposal originated with the Methods and Standards Association at the Naval Air Rework Facility, Pensacola, Florida.

If a unit employee is noncompetitively, temporarily assigned by management to perform the duties of a higher grade position for five days or more, went the union proposition, then that employee should receive the pay for that position.

According to the agency, however, its obligation to bargain is confined to personnel policies and practices relative to positions within the bargaining unit.

The association contended that its proposed clause would in no way limit or determine management procedures. The purpose of the clause was to make sure that employees temporarily assigned by management would be paid for higher level responsibilities.

The Authority found merit in the association's contention. The FLRA concluded that the clause was solely concerned with the level of compensation the employee would receive only after management selected that employee, pursuant to procedures of its own choice. The clause's language would not limit management in any way in filling supervisory jobs.

Since "nothing in the proposal would interfere with management's right to select and assign," the Authority found the proposal to be within the duty to bargain under Section 7117(a) of the Federal Service Labor-Management Relations Statute. (2 FLRA No. 34—December 21, 1979)

Consultant

Published biweekly by the U.S. Office of Personnel Management. Editorial inquiries should be addressed to Editor, The Consultant, Office of Labor-Management Relations, Room 7308, 1900 E Street, N.W., Washington, D.C. 20415. Phone (202) 632-6722.

All Federal departments and agency headquarters may order the Federal Labor-Management Consultant by sending a printing and binding requisition to the Government Printing Office, referencing CPM Printing requisition No. 30-34. Individuals may subscribe through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, at $16.00 per year ($20.00 foreign). Make checks payable to the Superintendent of Documents.

Unless otherwise specified, materials in this publication do not represent expression of official policy. Section numbers cited are taken from Title V, U.S. Code, Part III, Subpart F, Chapter 71, Subchapter I—IV. Use of funds for printing this publication has been approved by the Office of Management and Budget through March 1, 1983.

80-3

The Federal Labor-Management

Consultant

United States of America
Office of
Personnel Management

Route to:

1 FLMC 80-3

February 15, 1980

Pm 1.13:

MAR 7 1980

U.S. GOVT. PUBS.
DEPOSITORY 376

New Developments Checklist . . .

New FLRA regulations issued . . . p. 1
NTEU committed unfair labor practice by coercing employee to join union, Authority finds . . . p. 1
In four cases, FLRA determined negotiable the union proposals on safety shoes, grace periods for tardiness, joint union-management wage survey teams, and filling vacant positions . . . p. 1
Arbitrator eases penalty for employee charged with drinking, possessing alcoholic beverages . . . p. 2
FLRA reports on first year of operations under new statute . . . p. 3

Final Regulations Issued by FLRA

The Federal Labor Relations Authority has issued final rules and regulations of the Authority, its General Counsel, and the Federal Service Impasses Panel, effective January 28, 1980. These new rules replace the interim regulations under which the Authority operated in 1979.

Although the final rules are substantially similar to the interim rules, there are some changes in the final version. The changes include the time limits for filing certain actions, and the use of either the unfair labor practice or negotiability challenge in bargaining disputes. (See *Federal Register*, January 17, 1980.)

NTEU Told to Cease and Desist

The National Treasury Employees Union committed an unfair labor practice when it coerced a nonmember employee to join NTEU as a condition for being nominated as an EEO counselor by the union, ruled the Federal Labor Relations Authority. The complaint, brought by the Bureau of Alcohol, Tobacco and Firearms, charged NTEU with violating Section 19(b)(1) of Executive Order 11491. The section prohibits labor organizations from coercing employees in the exercise of their rights under the Order—in this case, the right to join or refrain from joining a union.

Under the BATF-NTEU contract, management selects EEO counselors for bargaining unit employees from a list of nominees submitted by the union. BATF asked the union to submit names for an EEO counselor position in Detroit, and suggested that the union consider a specific employee who was interested in the job.

When the president of NTEU Chapter 88 talked to the employee, he said it would put him in a bad position if he nominated a nonunion member of the unit. The employee replied that she did not realize union membership was a requirement. The president then said that it was not, but repeated his earlier statement. The employee testified that she next asked if his conversation meant that he would not nominate her unless she joined the union. The president responded, "No, I don't mean I won't put your name in, but you can understand my position, and all you have to do is fill out the form for membership."

The Administrative Law Judge found coercion in this conversation between the president and the employee. In concurrence with its ALJ, the Authority upheld the unfair labor practice complaint and ordered NTEU to post a notice that it would cease and desist from such coercion. Because this was a transitional case pending under Executive Order 11491, the Authority based its decision solely on the Order. (2 FLRA No. 51—December 31, 1979)

Negotiability Issues

In its recent review of four cases concerning union proposals found nonnegotiable by agencies, the Federal Labor Relations Authority ruled in each case that the proposals were within management's duty to bargain under the Federal Service Labor-Management Relations Statute. Three of the proposals were advanced by the American Federation of Government Employees and one by the National Labor Relations Board Union (NLRBU). Their subject matter ranged from safety shoes, employee grace periods, and joint union-management wage survey teams to filling vacant positions.

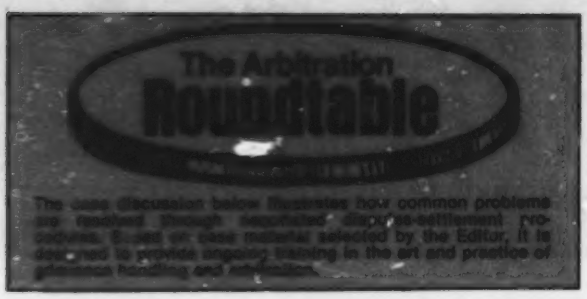
One, Two, Buckle My Shoe

The employer should provide safety shoes without charge to personnel engaged in foot hazardous operations who are required to wear foot protection, requested AFGE Local 1928 at the Naval Air Development Center, Warminster, Pennsylvania.

In rebuttal, the agency cited a Department of Defense regulation requiring DoD components to provide at government expense personal protective equipment, such as safety shoes, which employees are required to wear. This regulation bars negotiations, alleged the agency, under Section 7117(a)(2) of the statute.

This section provides that the duty to bargain extends to agency-wide rules *only* if FLRA determines that no compelling need exists for the regulation. The

(Continued on page 4)



The case discussion below illustrates how common problems are resolved through negotiated dispute-settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

A Loaf of Bread, a Can of Beer

Casefacts: The night guard was patrolling Norfolk Naval Shipyard when he saw two men sitting in a van drinking from cans. As the guard approached he saw one man, the grievant, put a can of beer to his mouth.

When the grievant refused to show identification, the guard called for assistance. Within three minutes, two other officers arrived and searched the van. The beer can from which the grievant had been drinking was cold. An empty soft drink can was found on the passenger side where the other employee was sitting. A cooler in the van contained 16 cans of beer.

The grievant and his companion were taken to the shipyard police station. According to the preaction investigation report, although the grievant admitted that he was having a beer on lunch break, no odor of alcohol was noticeable on his person and he was sober. He was allowed to return to work.

Following the investigation, three charges were levied against the grievant: (1) leaving the job without prior permission; (2) unauthorized possession of alcoholic beverages on Navy premises; and (3) drinking alcoholic beverages on Navy premises. Management gave him an eight day suspension.

At the arbitration hearing the grievant acknowledged forgetting to remove the beer cooler from the van following a fishing trip, but he denied that he was drinking it and that he left his work area without proper permission. He and a fellow employee had gone to his van to eat and listen to the radio.

The incident occurred on the graveyard shift, a shift described in the Shipyard-Metal Trades Council contract as running from "11:40 p.m. to 4:40 a.m. with no scheduled lunch period."

Management testified that an attempt is made to observe a 3:30-4:00 a.m. lunch break. Employees are told to stay by their machines and eat, and not to leave work stations without permission. The grievant had been told directly not to leave without permission of his supervisor.

The union's version of the lunch break contradicted management's. Witnesses testified that there was always a scheduled lunch break on the third shift. Employees could eat anywhere they pleased in the shipyard, did not have to stay in the shop, and had not been told not to leave without permission.

Management pointed to regulations prohibiting the unauthorized possession and consumption of alcoholic beverages within the shipyard. It contended that the grievant violated three rules, and the suspension was within the range of established penalties.

The union argued that the evidence did not show beyond a reasonable doubt that the defendent was drinking beer. The light was poor, and because beer was found in the van the guard assumed that the grievant was drinking it.

Issue: Did management have just cause to discipline the grievant? If so, was the penalty imposed the minimum which reasonably might be expected to correct the employee and maintain discipline and morale?

Award: Arbitrator James P. Whyte sustained the grievance in part by reducing the suspension from eight days to seven. He awarded the grievant one day's back pay at straight time.

In reaching his decision, the arbitrator found that the grievant was in unauthorized possession of alcoholic beverages and just cause existed for discipline.

Whyte reasoned that the evidence supported the charge that the grievant was drinking beer when seen by the guard. There was sufficient light to identify the can; the can was cool; and the grievant refused to identify himself—not the action of an innocent person.

"Having and drinking alcoholic beverages on the job are matters which endanger not only the offender but also his fellow employees and the property of the government," said the arbitrator. "For these reasons a relatively severe penalty is justified to impress the offending employee and to maintain discipline and morale."

Whyte concluded that employees were not required to stay in work areas during the lunch period: "No doubt they *ought* to have stayed there. No doubt they had been told from time to time that they needed permission to leave the area. But no doubt, too, that they were nonetheless permitted to leave their work areas during the lunch period without disciplinary action being taken by their supervisors."

In this kind of situation management should have announced that the practice would be terminated and no longer tolerated, noted Whyte. Since this was not done, just cause did not exist to discipline the grievant for leaving his work area without proper permission, and the penalty must be modified. (Norfolk Naval Shipyard *and* Tidewater Virginia Federal Employees Metal Trades Council—September 14, 1979. LAIRS #12209)

The Federal Labor Relations Counsel

3 FLMC 80-3 February 15, 1980

FLRA Reviews First Year of Operation

Reviewing its first year of operation under the Civil Service Reform Act, the Federal Labor Relations Authority reports a substantial level of case actions at the same time it was setting up a new national and field structure and developing rules and regulations. To sum up the report:

- The Authority closed 306 cases: 145 unfair labor practice, 44 representation, 63 negotiability, 30 arbitration, and 24 others.
- The General Counsel disposed of 2,982 cases at the Regional Office level.
- The Office of Administrative Law Judges disposed of 210 cases.
- The Federal Service Impasses Panel closed 100 cases.

In commenting on the report, FLRA Chairman Ronald W. Haughton said, "We are the new agency ... which under Title 7 of the Civil Service Reform Act referees the collective bargaining process in the Federal sector. In addition, the Federal Service Impasses Panel, an entity within the FLRA, has ultimate and binding authority to resolve Federal negotiation impasses."

"Our principal objectives for the first year were: (1) To get a national and nine regional office field structure in place and make it operational; (2) To develop operating rules and regulations; and (3) To clear the backlog of pending cases that arose prior to the act. We have effectively completed these first steps, and have turned to our main job of adjudicating cases of all types under Title 7."

Authority Reduces Backlog

When FLRA began operations in 1979, it had a backlog of some 1,000 cases inherited from the previous Executive Order program, and FSIP had 27 carryover cases. By the end of the year FLRA had reduced the backlog to fewer than 50.

In its first year of operation the volume of cases increased from 1,000 to 4,000, substantially exceeding estimates based on activity under the Order. The 3,985 new cases were filed in the regional offices, of which 3,367 were unfair labor practice charges and 618 were representation petitions. (Regional case statistics will appear in a future issue.)

At the national office level, 584 new cases reached the Authority for final disposition: 237 negotiability cases (as compared with 49 such cases filed in 1978); 173 unfair labor practice cases; 81 representation cases; 64 arbitration cases; and 29 miscellaneous, primarily grievability/arbitrability cases that arose under the Executive Order. The Authority's Office of Administrative Law Judges received 265 cases, and the FSIP received 129 requests for consideration.

According to Haughton, the FLRA's "across-the-board policy of encouraging informal settlements at every level has enabled us to keep pace."

The FLRA starts its second year with 2,420 open cases pending in the field and 396 cases in the national office. The Office of Administrative Law Judges has 48 cases awaiting decision with another 106 scheduled for trial. Fifty-six cases remain on the Panel's docket.

Federal Labor Relations Authority National Office Caseload Report—December 1979

TYPE OF CASE	On Hand 1/1/79	Received to Date	Closed to Date	On Hand 12/31/79
Unfair Labor Practice				
Request for review of regional decision	24	54	54	24
Case transferred by region or ALJ	6	113	67	52
Appeal from A/SLMR decision	18	6	24	0
Representation				
Request for review of regional decision	8	20	13	15
Case transferred by region or ALJ	20	58	24	54
Appeal from A/SLMR decision	5	3	7	1
Grievability/Arbitrability				
Request for review of regional decision	12	23	19	16
Negotiability	4	237	63	178
Arbitration	21	64	30	55
Other*	0	6	5	1
TOTAL	118	584	306	396**

*Includes various types of cases for which there are fewer than four on hand in the time period covered by this report.

**Two other cases (Nos. 78A-46 and 0-AR-32) involve post-closing matters (requests for reconsideration) and are not reflected statistically as "on-hand."

(Continued from page 1)
agency noted that the FLRA had made no determination on compelling need for the regulation.

In ruling the union proposal negotiable, the Authority concluded that the agency failed to support its allegation. "The agency does not advert to any conflict between the proposal and the regulation," stated FLRA. "Moreover, the agency does not make any showing whatsoever to support a finding that a compelling need exists." (2 FLRA No. 62—January 17, 1980)

Grace Period for Tardiness?

NLRBU Local 5 proposed that "Professional employees are entitled to one thirty-minute grace period per pay period" and "may use all or part of this grace period to cover occasional and unavoidable instances of tardiness in reporting for work in the morning."

From the viewpoint of the employer, the National Labor Relations Board, this proposal was an attempt to negotiate a workweek of less than forty hours. It therefore violated Federal law and government-wide regulations prohibiting a reduction of the basic workweek.

Setting aside the employer's argument, the Authority found the proposal within management's duty to bargain in carrying out Section 7117(a). "The proposal does not authorize employees to be late to work or to work less than forty hours a week," FLRA reasoned. Rather, the question is whether the agency has "discretion under law and regulations to excuse such occasional, unavoidable and brief absences during duty hours." Finding no statutory bar to preclude an agency from exercising its administrative discretion in such matters, FLRA upheld negotiability of the proposal. (2 FLRA No. 42—December 31, 1979)

Union Representation on Wage Survey Teams

The Marine Corps Command, Quantico, Virginia, refused to bargain on AFGE Local 1786's proposed right to union representation on survey teams which gather local prevailing wage data for use in setting the pay of hourly-paid, nonappropriated fund employees. The activity asserted that the proposal violated management's reserved right to determine personnel under Section 7106(a)(2)(B).

FLRA, however, found nothing in the disputed proposal to interfere with the agency's right to select personnel to represent its interests on the wage survey teams. In the Authority's judgment, the proposal merely provided for union representation on such *already established* teams.

Moreover, stated the Authority, the provision is entirely consistent with public policy, as expressed by Congress in 5 U.S.C. Section 5343(c)(2), of providing unions a direct role in the determination of pay for certain other hourly-paid Federal Employees. (2 FLRA No. 58—January 17, 1980)

Union Urges Consideration in Filling Vacancies

Veterans Administration, Perry Point, Maryland, should have negotiated when AFGE Local 331 urged the activity to give consideration filling vacant positions to employees within the bargaining unit, held the FLRA.

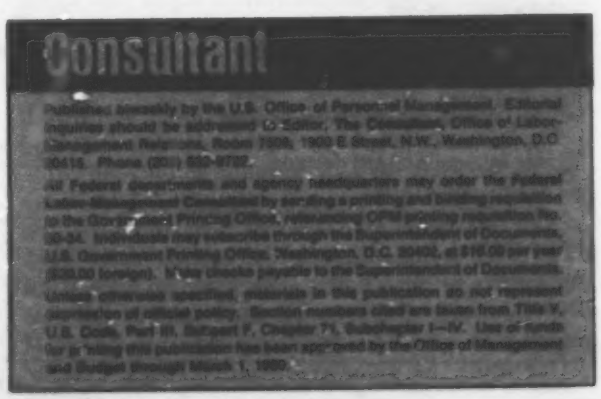
The union further proposed that management not select applicants from outside the minimum area of consideration or call for a register of candidates if three or more highly qualified candidates could be identified within the minimum area of consideration. The AFGE proposal added that applicants from other VA field units were not prevented from applying, provided they specifically applied for the vacancy being filled, and that they are ranked and rated with the same merit promotion panel as local employees.

The VA asserted that the proposal was nonnegotiable for two reasons. First, it might be interpreted as applicable to the filling of positions outside the bargaining unit, whereas management's duty to bargain applied only to nonsupervisory promotions within the unit. Second, with respect to filling positions the statute guarantees management's right to make selections "from among properly ranked and certified candidates for promotion or any other applicable source," (Section 7106(a)(2)(C)).

The FLRA, however, found that since the union expressly conceded the proposal was not intended to apply to supervisory or other management positions outside the bargaining unit, and since the proposal's language did not require an interpretation inconsistent with the union's stated intent, the proposal was within the agency's duty to bargain.

Turning to VA's second assertion, the FLRA found it without merit. AFGE's proposal, ruled the Authority, "would not prevent management from exercising its reserved right to select. Rather it would require only that *consideration* will be given . . . to employees within the bargaining unit." Management was not prevented "from expanding the area of intensive search for eligible candidates or from making selections from any appropriate source once the minimum area of consideration was considered and exhausted as the source of a sufficient number of highly qualified candidates."

Citing legislative history regarding Section 7106(a)(2)(C), FLRA concluded that "Congress intended to preserve management's right to select in filling a position, but to afford the parties an opportunity to negotiate concerning standards, criteria and procedures to the extent that bargaining on such matters would not prevent management from exercising the right *to make the actual selection*." (2 FLRA No. 59—January 17, 1980)



80-4

The Federal Labor-Management

Consultant

1 FLMC 80-4

February 29, 1980

United States of America
Office of
Personnel Management
Route to:

NEWARK PUBLIC LIBRARY
MAR 12 1980
U. S. G.P.O.
DEPOSITORY

New Developments Checklist . . .

If union declares issue nonnegotiable, agency cannot appeal . . . p. 1
Past practice is no defense in IRS-NTEU case . . . p. 1
President reappoints two Panel members . . . p. 1
Authority dismisses ULP charges against BATF . . . p. 1
Arbitrator overturns suspension of air traffic controller . . . p. 2
Annual calendar of union conventions . . . p. 3
FLRA rules on 16 issues in negotiability decision . . . p. 4

Rights of Appeal

Management may not appeal a union's determination that a proposal is nonnegotiable, ruled the Federal Labor Relations Authority in dismissing a Veterans Administration's petition seeking such review. The Authority concluded that while Section 7117(c) of the Federal Service Labor-Management Relations Statute clearly provides that a union with exclusive recognition may appeal an agency's allegation of nonnegotiability, nothing in the statute or legislative history suggests that Congress intended an agency to file such an appeal. (2 FLRA No. 54—January 4, 1980)

FLRA Rejects Past Practice Defense

By holding in abeyance a contractual grievance, pending the outcome of an EEO suit based on substantially the same facts, the Internal Revenue Service committed an unfair labor practice, the Federal Labor Relations Authority ruled. The charge was brought by the National Treasury Employees Union under Section 19(a)(1) and (6) of Executive Order 11491.

It was past practice in the IRS Austin District that if an EEO grievance was raised under both the contract and the agency's internal administrative procedure, the contractual procedure was suspended until the matter was settled administratively. In this case, however, the grievance had gone through the administrative process and on to a suit filed in U.S. District Court.

The FLRA found that management's extension of an existing practice was a unilateral change in personnel policies and practices and thus a violation of the Order. The Authority rejected a finding by its Administrative Law Judge that IRS acted in good faith and was not trying to obstruct the negotiated grievance procedure. The FLRA noted that its decision was based solely on the Order and as if the new Federal Service Labor-Management Relations Statute had not been enacted. (2 FLRA No. 71—January 25, 1980)

PM 1.13:

McKelvey, Bernstein Reappointed

President Carter has reappointed Jean T. McKelvey and Irving Bernstein to the Federal Service Impasses Panel, each for a five-year term. McKelvey, professor of industrial and labor relations at Cornell University, has been a FSIP member since the Panel's inception in 1970. Bernstein, who was first appointed in 1978, is professor of political science and research associate of the Institute of Industrial Relations at the University of California in Los Angeles. Both are well-known arbitrators.

Reverse the Charges

The Bureau of Alcohol, Tobacco and Firearms' termination of the union's use of telephone, mail and copying facilities was followed by an unfair labor practice charge by the National Treasury Employees Union. The Federal Labor Relations Authority dismissed the charge, finding that management's action was not unilateral but rather a result of good faith bargaining by the parties.

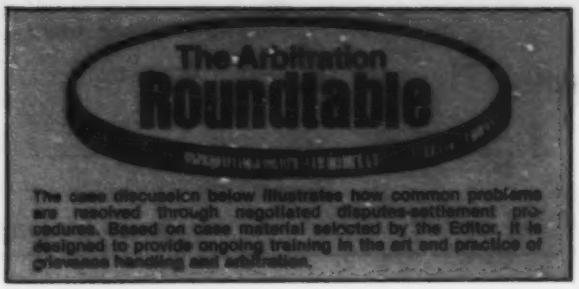
For several years the Bureau's central region had allowed the local union president to use government phones to confer with stewards and the NTEU national office about grievances, other formal actions, and application of the contract. (National office calls were charged to his home phone.) He also used the activity's copying and postage facilities for representational matters.

When negotiations began on the contract covering regional employees, NTEU proposed that each steward be provided with a phone, and buttressed its case with references to past practice in the central region. The union also proposed that management agree to deliver mail via the intra-agency mail system, using the same argument. No proposal was made regarding use of copying facilities, but in general discussion this past practice at the central region was made known.

For the first time management outside of the central region became aware of the practices. The Bureau said that it would not allow them to continue; they would have to be stopped. The activity refused to agree to either NTEU proposal, and the union subsequently dropped them. The agreed-upon contract had no language on past practices involving these uses of government facilities.

NTEU argued that the past practices were left intact, and that no waiver of its right could be found in bar-

(Continued on page 4)


The Arbitration
Roundtable
The case discussion below illustrates how common problems are resolved through negotiated disputes-settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

I Can't Hear You, the Water's Running

Casefacts: At a southern airport the air traffic controller was working alone in the cab of the control tower. He was responsible for the control of air traffic in the airspace assigned to him as well as the airport itself. The controller issued a blanket clearance to a DC-9, left for the lavatory, returned to the cab, and sat down.

After he had last spoken to the DC-9, the plane crashed on takeoff, injuring two crewmembers. It came to rest 1,500 feet in front of the tower. When no emergency equipment appeared, several crewmembers walked to the tower and found the controller, seated, and a television set going.

Not aware of the crash until informed by the crew, the controller looked out of the window and saw the plane where it had come to rest. He immediately implemented emergency procedures.

The Federal Aviation Authority gave the controller a ten day suspension for careless work performance resulting in danger of loss of life. The activity maintained that "the seriousness of the carelessness and the grievant's attitude in disclaiming responsibility" justified the penalty.

Management contended that normal operating procedures require the controller to notify the DC-9 that he would be absent and how long. Upon returning to the tower he should have made a visual check and radio call to ascertain where the plane was.

FAA was outraged at the grievant's claim that he had not looked out the window because "I didn't know I had to do it" when he had an airplane out there. Another factor indicating the controller's carelessness was his failure to look out when the sound of the plane abruptly ceased.

The grievant testified that the chair was too low to permit him to see out the window. To see a plane under his control at all times he would have had to stand on the console. Furthermore, he had not heard the accident.

Witnesses testified that the airport never trained controllers that issuing blanket clearances was a less than desirable practice. There were no established procedures or training on controllers' responsibilities when leaving the cab to use the rest room, or on what was expected of them upon return. It was not until after the accident that management issued written procedures.

FAA rebutted that it was not necessary to have this in writing as a controller should be expected to realize it: a controller could not do his job without knowing what was going on, and where an airplane was.

The Professional Air Traffic Controllers Association argued that the grievant could not be considered careless. He issued a blanket clearance according to his instructions, watched the plane depart behind the tower, and then visited the toilet facility. When he returned to the cab, he made a visual check but did not see the damaged aircraft. It had come down in a wooded area beyond the runway, and there was little contrast in color between the aircraft and surrounding foliage.

PATCO pointed to the contract clause on disciplinary action: "It should be established whether the employee knew, or could reasonably be expected to know, what standard of conduct or performance was expected of him." Since the grievant did not know the standard, claimed the union, the incident was not a disciplinary matter and the penalty was overly severe.

Issue: Was the grievant suspended for just and substantial cause?

Award: No, ruled Arbitrator James J. Sherman, as he directed management to rescind the grievant's disciplinary suspension and reimburse him accordingly.

Sherman noted that before an arbitrator can determine whether the employee's performance was *below* acceptable standards, he must know what type of behavior is reasonably expected. Management must then prove that the employee knew or should have known what was expected of him, that his performance fell below these reasonable expectations, that the standards were applied consistently, and that the penalty was appropriate.

In this case, said Sherman, management acknowledges that there were no explicit procedures but insists that there were general rules and reasonable expectations of which any experienced controller should have been aware, including the maintenance of visual contact with aircraft.

The arbitrator stated that in the absence of specific procedures "an employee will draw his own conclusions concerning acceptable behavior. The employee accepted conditions in the tower as created by someone in authority: no relief when he had to leave the tower; a console which was too high to see over unless one stood for the entire shift; a chair obviously too low to permit visual contact with an aircraft on the ground; and a television set of which management was obviously aware." Under these circumstances the grievant's failure to witness the crash could not be judged a negligent omission. He was never directed to inform the aircraft that he would be absent from the tower, and the practice was to issue a blanket clearance and simply wait for the aircraft to request assistance.

After looking at photographs of the crash, the arbitrator decided that one could make a visual scan without observing the plane. Additionally, the arbitrator had no way of knowing whether the crash was audible in the tower. "There were simply too many gaps in the evidence" to support management's assertions. "Many factors contributed to an atmosphere of laxity and inattentiveness at this tower, and it is not apparent that the grievant was any less attentive than any other employee would have been under the circumstances." (Federal Aviation Administration *and* Professional Air Traffic Controllers Organization—November 30, 1979. LAIRS #12285)

1980 Convention Calendar

Many of the organizations with exclusive bargaining rights in Federal agencies will be holding national conventions this year. Following is a chronology of conventions scheduled for the remainder of 1980, excluding postal organizations. AFL-CIO affiliates appear in italics; all others are independent.

March

17 *National Marine Engineers' Beneficial Association*
Fort Lauderdale, Florida

24 Federal Plant Quarantine Inspectors National Association
El Paso, Texas

April

21 *Professional Air Traffic Controllers Organization*
Las Vegas, Nevada

June

8 American Nurses' Association
Houston, Texas

9 *American Federation of State, County and Municipal Employees*
Anaheim, California

23 *Service Employees' International Union*
New York, New York

July

1 National Education Association
Los Angeles, California

21 *International Federation of Professional and Technical Engineers*
Toronto, Canada

August

18 *American Federation of Teachers*
Detroit, Michigan

18 *International Association of Fire Fighters*
Toronto, Canada

25 *American Federation of Government Employees*
Honolulu, Hawaii

September

2 *International Association of Machinists*
Cincinnati, Ohio

8 National Federation of Federal Employees
Tulsa, Oklahoma

October

1 Association of Civilian Technicians
Niagara Falls, New York

6 *National Maritime Union*
St. Louis, Missouri

9 National Weather Service Employees' Association
Indianapolis, Indiana

30 National Association of Government Employees
San Juan, Puerto Rico

December

9 Patent Office Professional Association
Washington, D.C.

(Continued from page 4)

scope of bargaining. It noted that although the proposals are tantamount to a temporary promotion, such promotions are not contrary to law or regulation.

Another proposal covering union use of the activity's internal phone system for contract administration and other appropriate official business was found by the Authority to be within AFLC's duty to bargain under Section 7117.

In turning down another proposal, the FLRA ruled that an agency may not be required to assign employees in RIF actions based on employee preferences. Since the proposal would compel the selection of a particular employee for assignment, it interferes with the discretion which is an essential part of management's right to assign under Section 71066(a)(2)(A). (2 FLRA No. 77—January 31, 1980)

(Continued from page 1)

gaining history, surrounding circumstances, or the agreement itself.

Management contended that past practices were stopped as a result of what was decided during negotiations, and that the union was put on notice that management intended to put a stop to the practices.

The Authority concluded that the record supported the Bureau's position that it did not unilaterally change past practices, but merely implemented provisions of the new contract. (2 FLRA No. 67—January 25, 1980)

Day Care Center Ruled Negotiable

In its lengthiest decision to date, the Federal Labor Relations Authority ruled on 16 issues in a negotiability dispute between the Air Force Logistics Command and the American Federation of Government Employees. The Authority, quoting copiously from legislative history of the Federal Service Labor-Management Relations Statute, declared eight of the AFGE proposals to be negotiable, seven nonnegotiable, and one in part negotiable and in part nonnegotiable.

"The employer will provide adequate space and facilities for a day care center at each ALC" with the union operating the self-supporting center for base employees, AFGE proposed. The Command argued that the proposal does not concern "conditions of employment" and is thus outside the agency's duty to bargain. Additionally, said the AFLC, it violates management's reserved right to determine its budget.

The Authority rejected the AFLC's arguments and ruled the proposal negotiable. "Availability of day care facilities affects the work situation in significant ways," said the Authority. It may determine whether an individual can accept and continue to hold a job, as well as influencing tardiness, absenteeism, use of leave and productivity. Moreover, FLRA judged, the proposal is not an attempt to prescribe the budget allocation for day care.

The Authority observed that since the agency did not assert the proposal would violate applicable law or regulations, FLRA made no ruling on this point.

Seniority for Details and Loans

Six union items involved seniority. The first asked that details to higher graded positions be based on seniority where the agency had not elected to use competitive procedures. The FLRA ruled this proposal negotiable because the agency retains the option of using competitive procedures.

Five would require management to base solely on seniority its selection of individuals for details to lower graded positions, "loans," temporary assignments outside the bargaining unit, mobility assignments, and assignment of certain temporary supervisory duties. The Authority ruled these five nonnegotiable because management is not permitted to use some other method. FLRA commented that under Section 7106(a)(2)(A) of the statute, "the agency retains discretion as to the personnel requirements of the work of the position, i.e., the qualifications and skills needed to do the work, as well as such job-related individual characteristics as judgment and reliability."

Mixed Rulings on EEO Proposals

AFGE submitted four EEO proposals. The first proposal would require the Command to establish a comprehensive EEO plan, and the second contained a detailed four-page action plan. Holding both proposals to be negotiable, the FLRA explained that "Congress intended such matters to be within the scope of the duty to bargain."

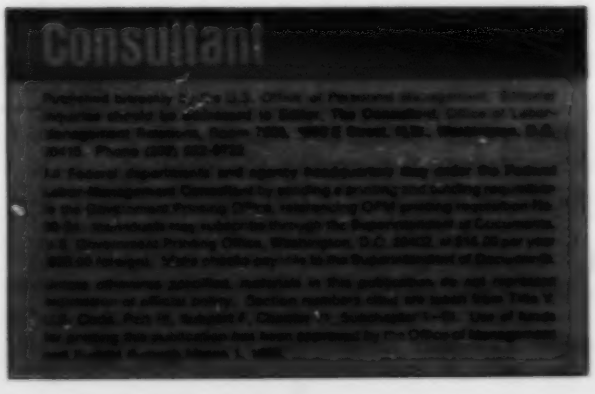
The third EEO proposal asked that "procedures for skills utilization will include redesigning of jobs where feasible," and went on to require management to *overhire* so that employees with handicaps and chronic ailments, or single heads of families, could use sick, annual or leave without pay. In the Authority's judgment, the opening sentence was negotiable, but requiring management to overhire violated management's right to determine the number of employees under Section 7106(b)(1). Management may, if it wishes, negotiate this issue but it is not obliged to do so, determined FLRA.

The last EEO proposal called for the activity to select half of the EEO counselors from a list provided by the union. FLRA sustained the agency's allegation that the proposal conflicts with management's reserved right to assign employees.

Other Proposals

Two proposals covered temporary promotions: an employee temporarily assigned to an encumbered but temporarily vacant position in the bargaining unit, and an employee temporarily assigned the duties of a higher graded position, will be paid at the rate of the higher position after 30 days. In the Authority's judgment, neither proposal conflicts with law governing Federal employee compensation and are therefore within the

(Continued on page 3)



The Federal Labor-Management

Consultant

United States of America
Office of
Personnel Management

Route to:

1 FLMC 80—5

March 14, 1980

NEWARK PUBLIC LIBRARY

APR 7 1980

U. S. GOVT. PUBS.
DEPOSITORY 376

New Developments Checklist . . .

DoD and OPM making first legal challenge to Authority's interpretation of management rights clause in CSRA . . . p. 1
Panel orders VA-AFGE to adopt its recommendations in their collective bargaining agreement . . . p. 1
Arbitrator rules on AFGE shift change grievance at INS . . . p. 2
VA has no duty to bargain on weekends off, rules FLRA . . . p. 3
Authority's regional caseload in 1979 . . . p. 3
Parties cannot seek direct review of FSIP order . . . p. 3
AFGE contract proposal to Georgia National Guard is partly negotiable, partly nonnegotiable . . . p. 3
OPM decides not to appeal Wells case . . . p. 4
Federal Service Impasses Panel TIE-LINE . . . p. 4

DoD, OPM Challenge FLRA Ruling

The Department of Defense and OPM will go to court to challenge the Federal Labor Relations Authority's interpretation of the management rights section of Title VII of the Civil Service Reform Act. The Authority ruled in the Fort Dix case that union proposals on implementation of reserved management rights are negotiable *unless the procedures prevent management from acting at all.* Its decision covered an American Federation of Government Employees' proposal which would stay implementation of suspensions or removals until a final determination was rendered under the contractual grievance procedure (2 FLRA No. 16).

The agency argued that the proposed procedure would result in unreasonable delay and thereby abridge management's right to suspend and remove. But citing the Joint Explanatory Statement of the Committee on Conference, FLRA held that "Congress rejected the standard of 'unreasonable delay' as the sole basis for excluding proposed procedures from negotiations."

At a recent DoD conference, Anthony F. Ingrassia, Assistant Director of OPM for Labor Management Relations, said he believes the Authority erred in rejecting the concept of unreasonable delay. "Both the statute and its legislative history suggest that it was not the intent of Congress that management be required to bargain on proposals that would cause unreasonable delay," stated Ingrassia, quoting statements by Congressman Morris K. Udall and other representatives in the House debate to prove his contention.

"DoD and OPM are moving ahead to appeal the Fort Dix decision to court as the first legal challenge to FLRA's interpretation of the management rights clause in the Civil Service Reform Act," he announced.

Panel Issues Order in VA-AFGE Case

In a bargaining impasse between Veterans Administration and the American Federation of Government Employees, the Federal Service Impasses Panel ordered the parties to adopt its earlier recommendations on break periods, time to cash checks, and overtime. The Panel took this action when a VA Regional Office refused to accept several of the Panel's recommendations while AFGE Local 2442 accepted all of them.

AFGE had proposed twenty minute rest breaks for all employees in the morning and afternoon, as well as fifteen minute breaks for every four hours of overtime. VA wanted to continue the present practice of allowing ten minutes only to employees in "tedious" positions and ten minutes for overtime work.

The agency asserted that the loss of additional productive time, coupled with a lowered ceiling allocation that meant the loss of thirty-three positions, would seriously affect its ability to handle the workload.

The Panel recommended that fifteen minute breaks be extended to all bargaining unit employees for morning, afternoon and overtime work. FSIP saw "a distinct advantage in having a uniform system of rest periods, such systems being common in other Government agencies," and the "bare assertion" of loss of productive work did not outweigh other considerations. When VA refused to accept the Panel's recommendations on breaks, FSIP directed both parties to adopt them.

The union had initially sought a fifteen minute break period for cashing checks on pay days, but it accepted the Panel's recommendation to withdraw the proposal.

AFGE further proposed a rotational system for distribution of overtime to all qualified employees on an equitable basis. Seeking to maintain its discretion to select employees on the basis of which employees will be most productive, VA rejected the Panel's recommendation to adopt the union proposal. FSIP then reissued its recommendation as an order.

When the parties arrived at impasse last summer, the Panel asked them to make written submissions of their final positions, the negotiability of the proposals, and rebuttal briefs. Based on the written submissions, FSIP made its recommendations, subsequently issued as a Decision and Order. (VA Regional Office, Newark, New Jersey and AFGE Local 2422, Case No. 79—FSIP 61, December 21, 1979)

PM 1.13:

Some Like It Not

Casefacts: Although it was usual for inspectors at the Immigration and Naturalization Service in Calexico, California to trade shifts, the officer in charge decided this had become a problem. He issued a memorandum to all personnel at the facility:

> In accordance with union agreement Article 29-E, Tours of Duty, this office has made every effort to allow unrestricted shift changes with only the consent of the supervisor being required. It has proven that this type of shift trading is not consistent with the needs of the Service. Inspectors have used shift changes to avoid working with different officers, locations and hours. It is, therefore, *necessary to limit shift changes to urgent types of situations.* Schedules are being posted well in advance so that any request for shift trades will be requested at least five working days prior to entering into the active schedule. The request will be made in memo form to the Assistant Officer in Charge who will determine if a great enough need is present to warrant the change. Request for emergency type of change will be considered at any time by any supervisor.

Upset by the memo, the American Federation of Government Employees Local 2805 filed a grievance.

Article 29-E referred to in the memorandum reads: "Where mutually agreeable to all employees affected, employees may trade shifts out of the normal rotation, consistent with the needs of the Service."

Additional contract clauses were cited by the parties at the arbitration hearing. Article 3-G requires INS to present proposed changes in practices and working conditions to the union for its view. Article 4-C lists management's right to assign employees and to maintain the efficiency of Government operations. Article 39-C says "... individual changes in the tours of duty schedule shall be posted in the work area. . . Exceptions to this provision may be made where there is mutual agreement between the employees and supervisors involved."

Union and management witnesses testified that prior to the memo, the practice was to allow almost unrestricted shift trading with only the consent of a supervisor.

Management contended that posted work schedules were being changed so often by inspectors that supervisors no longer knew what officers were assigned to their shift. Absent control of the shift trading, management could not operate efficiently and meet the needs of INS.

Charging management with failure to adhere to Article 29-E, the union questioned the number of problems caused by shift trading.

Issue: Did management violate Article 29-E by controlling the shift trading process?

Award: Arbitrator Joseph F. Gentile found management had violated Article 29-E when it issued the memo, and ordered it to redraft the memo in accord with his following comments.

One, Gentile said, the memo is "more restrictive and narrow than the language of the contract would reasonably indicate. Two, its guidelines are overly broad and general to provide reasonable administrative guidance to the affected employees. Third, it neglects and ignores the important role of supervision."

The arbitrator called this dispute "one of contract interpretation and application." Looking solely at the language of Article 4-C alone, he noted, it would appear that the activity could issue the memo without restrictions. But for an arbitrator to judge the intent of the parties as reflected in all provisions, an agreement must be read as a whole.

Gentile agreed that to have efficient operations, management must know who is scheduled for what shift. However, the memo's limitation on shift trading amounts to a restriction added to Article 29-E which is not "within the reasonable contemplation of the agreement."

"If there is a problem with communication by supervisors as to shift changes, particularly when the evidence indicated that the problems created by such changes were at most minimal, then management can effect the necessary changes."

The subjective judgment of management will still be required in evaluating each situation, determined Gentile, and the agreement provides to management this right. However, the impact of Article 29-E must also be taken into consideration.

The parties have differing views as to the reconciliation of Article 29-E with Article 4-C. To the arbitrator, past utilization of supervision in the shift change process was a forceful consideration, and the memorandum bypasses supervision.

The arbitrator observed that although Article 3-G interacts with Articles 29-E and 4-C, the union asked only whether Article 29-E was violated. Thus, whether Article 3-G was violated is not in issue. (Immigration and Naturalization Service and AFGE Local 2805—December 26, 1979. LAIRS 12302)

The Federal Labor Relations Counsel

3 FLMC 80-5 March 14, 1980

VA Refusal to Bargain is Upheld

The Veterans Administration's refusal to bargain on a union proposal guaranteeing that nurses will have every other weekend off has been upheld by the Federal Labor Relations Authority. Under Section 7106(b)(1) of the Federal Service Labor Management Relations Act, ruled the Authority, the VA *may elect* to bargain on the American Federation of Government Employees proposal, but it is *not required* to do so.

The Authority found that the proposal "is integrally related to, and consequently determinative of, the numbers, types of grades of employees assigned to a work project or tour of duty" and accordingly not within the agency's duty to bargain. (2 FLRA No. 78—February 4, 1980)

FLRA Reports Regional Caseload

In its first year of operations under the Federal Service Labor Management Relations Statute, the Federal Labor Relations Authority reported a busy year at its regional office level: almost 4,000 new cases plus a substantial backlog carried over from the prior Executive Order program. Of the 4,763 total, the General Counsel closed or otherwise disposed of 2,982 cases at the regional level.

Federal Labor Relations Authority Regional Offices

Caseload Report—December 1979*

	Pending 1/11/79	Received Jan.-Dec.	Total 1969
Boston	39	288	327
New York	76	372	448
Washington	234	885	1,119
Atlanta	78	420	498
Chicago	142	412	554
Dallas	75	454	529
Kansas City	50	434	484
Los Angeles	32	384	416
San Francisco	52	336	388
TOTAL	778	3,985	4,763

*Reflects transfer of Pennsylvania and Delaware cases from Washington Regional Office to New York Regional Office.

No Direct Review of Panel Orders

The Authority has ruled that there can be no direct review of Federal Service Impasses Panel decisions and orders to break bargaining impasses. This applies both to cases arising under Title VII of the Civil Service Reform Act as well as to transitional cases under the previous Executive Order 11491. The only recourse of an agency or union disagreeing with a Panel decision is to refuse to comply, thus triggering an Authority review through unfair labor practice procedures. (2 FLRA 20 and 21—December 5, 1979)

Spring Cleaning

A negotiability appeal before the Federal Labor Relations Authority was judged in part a violation of management's reserved rights and in part within the duty of the Georgia National Guard to bargain. The Association of Civilian Technicians' proposal concerns cleanup of duties of technicians.

The first paragraph of the proposal provides that "technicians . . . will not be utilized for grounds maintenance or activities which are not job related" and "will not be directed to assignments outside his/her position duties without his/her consent." The FLRA found that because this would prevent the activity from assigning certain duties to technicians even if their position description were amended to include such duties, it violates the Federal Service Labor Management Relations Statute. Section 7106(a)(2)(B) of the law gives management the right to assign work.

The second paragraph of ACE's proposal reads that "when a general cleanup is required, assignment will be made on an equitable basis." ACE asserted that this was not intended to limit or restrict management's right to assign work, but rather to seek a fair solution to cleanup and groundskeeping.

The Authority agreed with ACE, commenting that since there was no showing that a procedure to distribute cleanup assignments equitably will prevent management from acting at all in assigning duties, the proposal was within the duty to bargain under Section 7106(b)(2). (2 FLRA No. 75—January 25, 1980)

More on the Wells Case

Letting pass the deadline for filing an appeal, OPM has decided not to seek court review of the Merit System Protection Board's decision in the *Wells vs. Harris* case. Part of the decision overturned OPM regulations which permit agencies to take immediate action against poor performers. The Board held that employees could not be fired or demoted for unacceptable performance under the Civil Service Reform Act's new streamlined procedures unless OPM-approved performance appraisal systems had been established. Before taking such removal or demotion actions under 5 USC 4303, agencies must establish the systems and clearly communicate the standards and critical elements to the employees affected by them.

In OPM's view, the Board's decision also has several positive aspects. Agencies may adopt performance standards tailored to each individual job rather than being required to adopt common standards for similar jobs. Also, they may establish systems in appropriate components of an agency rather than awaiting agency-wide implementation. Poor performers must prove that errors made in filing agency actions were harmful to their cases, and adverse actions cannot be overturned on minor errors or technicalities.

Because of these positive aspects, said OPM's Deputy General Counsel Paul Trause, and because any adverse effect of the decision will last only until agencies have their appraisal systems in place, OPM has decided not to appeal the decision.

On January 24, OPM issued FPM Bulletin No. 432-3 headed "Guidance for Reduction in Grade and Removal Based on Unacceptable Performance Which Will Meet the MSPB Order in the Case of *Wells vs. Harris* (MSPB Order No. RR-80-3)." The bulletin discusses the impact of the decision and advises agencies of the options available to them.

The Federal Service Impasses [illegible] LINE

The Federal Service Impasses Panel reported a number of actions to resolve bargaining impasses between Federal agencies and unions.

Assistance by a Panel-appointed factfinder at the prehearing conference led to settlement in three disputes:

•Details, priority placement, reduction-in-force and demotions, reserved parking, and rights and obligations—Army Missile and Munitions Center and School, Redstone Arsenal, Alabama and American Federation of Government Employees Local 1858 (Case No. 79 FSIP 67, October 15, 1979).

•Hours of work and noise hazard—Defense, State of New Jersey and National Association of Government Employees (Case No. 79 FSIP 83, November 28, 1979).

•Hours of work—Naval Telecommunications Command, Washington, D.C. and AFGE Local 1 (Case No. 79 FSIP 93, December 6, 1979).

The Panel declined to assert jurisdiction in three cases concerning negotiability:

•Impact and implementation of manual supplements relating to overtime for inspectors—U.S. Customs Service, Washington, D.C. and National Treasury Employees Union (Case No. 79 FSIP 47, December 7, 1979).

•Official time, flexitime and other issues—Naval Underwater Systems Center, Newport, Rhode Island and NAGE Federal Union of Scientists and Engineers (Case No. 79 FSIP 58, December 12, 1979).

•Number of union representatives to receive official time for contract negotiations—Defense Contract Audit Agency, Chicago and AFGE Local 3529 (Case No. 79 FSIP 89, December 12, 1979).

Because voluntary efforts to reach agreement had not been exhausted, FSIP declined to assert jurisdiction in the following cases:

•Social Security Administration, Milwaukee and AFGE Local 1346 (Case No. 79 FSIP 73, October 16, 1979).

•Kentucky National Guard and NAGE (Case No. 79 FSIP 78, October 17, 1979).

•Small Business Administration, Colorado District and National Federation of Federal Employees Local 1851 (Case No. 79 FSIP 82, November 6, 1979).

Settlements were reached by the parties at early stages of the Panel's procedures, in many cases with the assistance of the Federal Mediation and Conciliation Service:

•Agriculture, Animal and Plant Health Inspection Service, Laredo, Texas and AFGE Local 3106 (Case No. 79 FSIP 77, October 18, 1979).

•Labor, Washington, D.C. and AFGE Local 12 (Case No. 79 FSIP 56, November 9, 1979).

•Naval Air Rework Facility, San Diego and International Association of Machinists Local 726 (Case No. 79 FSIP 72, November 9, 1979).

•Social Security Administration, Angleton, Texas and NFFE Local 1823 (Case No. 79 FSIP 104, November 13, 1979).

•Social Security Administration, Baltimore and AFGE (Case No. 79 FSIP 71, November 20, 1979).

•General Services Administration, Chicago and AFGE Local 3751 (Case No. 79 FSIP 46(a), November 26, 1979).

•Internal Revenue Service, North Atlantic Region, New York and AFGE Local 15 (Case No. 79 FSIP 69, December 7, 1979).

The Panel approved requests for withdrawal by:

•HEW, Baltimore and AFGE (Case No. 79 FSIP 36, October 29, 1979).

•Veterans Administration, Perry Point, Maryland and AFGE Local 331 (Case No. 79 FSIP 7, October 30, 1979).

•Agriculture, Plum Island Animal Disease Center, Greenport, New York and AFGE Local 1940 (Case No. 79 FSIP 90, December 26, 1979).

Consultant

[illegible]

80-6

The Federal Labor-Management

Consultant

1 FLMC 80-4

March 28, 1980

United States of America
Office of
Personnel Management
Route to:

NEWARK PUBLIC LIBRARY
APR 10 1980
U.S. GOVT. PUBS.
DEPOSITORY

New Developments Checklist . . .

Health and Safety E.O. has labor-management implications . . . p. 1
Panel orders NLRB union to accept recommendations . . . p. 1
FLRA tells VA not to be "thin-skinned" . . . p. 1
Arbitration case of Air Logistics—AFGE involves mopping duties of mechanics . . . p. 2
U.S. Marshals Service must negotiate on union proposal . . . p. 3
Authority overrules ALJ, finds ULP at Energy . . . p. 3
Negotiability issue settled at NLRB . . . p. 3
Court dismisses National Guard petition for review of FSIP Decision and Order . . . p. 4
No statutory basis for Authority to seek court enforcement of arbitration award where no exception filed . . . p. 4

President Gives Unions Larger Role In Safety and Health Programs

President Carter's new Executive Order, Occupational Safety and Health Programs for Federal Employees, encourages the establishment of joint labor-management safety committees. The committees, which may be formed at national, regional and other appropriate levels, will be composed of an equal number of management and employee or union representatives. If there is no joint committee, or under certain other conditions, the Occupational Safety and Health Administration may make unannounced inspections of Federal offices and installations.

The joint committees will:

—Review agency program information.

—Monitor performance of agency programs, including inspections.

—Consult and advise the agency on the operation of the program.

Agencies must conduct periodic inspections of their work place. They are also required to provide safety training to supervisors, inspectors, and members of the joint committees. The Order also requires agencies to establish procedures to protect the rights of workers who report safety violations.

The Federal Advisory Council on Occupational Safety and Health is continued, with eight members representing management and eight Federal employee unions.

Responsibilities given to the Department of Labor include issuing rules, providing technical services to agencies upon request, and evaluating agency programs on a regular basis.

Executive Order 12196 becomes effective July 1, 1980.

Panel Directs Settlement at NLRB

A deadlock in negotiations between the National Labor Relations Board and the NLRB Union ended as the Federal Service Impasses Panel issued a Decision and Order. The issues in dispute concerned employee details from one NLRB regional office to another. When the Panel's initial recommendations were accepted by the employer but rejected by the union, the Panel reissued its recommendations in the form of an order.

The first union proposal sought to have no employees involuntarily detailed so long as volunteers were available. The NLRB argued that this would force it to repeatedly accept for details those employees with performance deficiencies and, since they require more supervision and are less productive, the approach would impose an extra burden on offices already understaffed. The Panel told the parties to adopt the employer's counterproposal whereby the NLRB would not be obligated to select an employee who had previously served a detail until all other qualified employees had served such a detail.

With respect to the second issue, the union sought reimbursement for a round trip home each weekend for employees during the length of their detail. The employer proposed paying for one round trip home for a sixty-day detail and two trips for a ninety-day detail. Taking the middle ground, the Panel recommended that one such trip be authorized for each thirty-day period of detail. (National Labor Relations Board, Washington, D.C. and National Labor Relations Board Union, Case No. 79 FSIP 62—December 21, 1979)

Sticks and Stones

Management of the Veterans Administration Regional Office in Denver, Colorado committed an unfair labor practice as defined in Executive Order 11491 by disciplining the president of American Federation of Government Employees Local 1557 for use of "classical labor relations rhetoric" in criticizing a personnel officer, the Federal Labor Relations Authority determined.

In filing a grievance for another bargaining unit employee, the union president wrote that the personnel

(Continued on page 4)

PM 1.13:

If Seven Maids with Seven Mops

Casefacts: Mechanics in the MAN Division at Sacramento Air Logistics Center were indignant at being required to mop floors in their immediate work areas. They were aware that as the result of a grievance settlement several years ago, the Center's MAI Division used laborers to do the mopping, not mechanics. They saw no set policy or uniform practice for the entire MAN area concerning custodial duties and compliance with the labor agreement. American Federation of Government Employees Local 1857 filed a grievance.

Article XIV, Section 4 of the contract reads: "Position description terminology 'other duties as assigned' refers to job related duties but does not preclude housekeeping duties inherent in all positions. Normally, custodial type duties will be performed by employees hired for that purpose. Shop personnel may be expected to perform minimal custodial and maintenance service, in and around their immediate work area, that is directly related to their duties."

At the arbitration hearing the parties agreed that "immediate work area" is a small, four or five foot area with a work bench and space for the mechanics' tools. Mops and water buckets were brought to MAN mechanics by custodial employees. The time for mopping the immediate work area every week or two was variously estimated at thirty seconds to thirty minutes a week. In larger areas where no laborer support was provided, the time was estimated at one to one and one-half hours.

AFGE contended that mopping the immediate work area on a regular and recurring basis is a custodial type duty and should be done by laborers. Requiring mechanics to do so violates the contract.

In addition, said the union, both MAI and MAN divisions perform similar shop work, are within the Directorate of Maintenance, and are in the bargaining unit. Management properly utilized laborers in compliance with the contract in the MAI Maintenance Division, but failed to do so in MAN. MAI has had an established practice since 1974 of using laborers to mop immediate work areas, and mopping practices should be uniform among mechanics in the bargaining unit.

The union agreed with management that if a mechanic dropped an unsafe substance in the immediate work area, it should be cleaned up immediately rather than waiting for the janitor.

With respect to past practice, AFGE claimed, a previous grievance by a small group of MAN shop personnel resulted in the hiring of two laborers to clean, and this practice continued for four years until management again required mechanics to mop.

In rejoinder, the activity contended that management has historically maintained its option of requiring this task to be performed by shop personnel, and followed this practice on a continuing basis.

A management study revealed that an average mechanic spends 5.13 minutes per day cleaning the work area, including daily sweeping and maintenance of tools as well as mopping.

Soiling of the floor in the immediate work area is caused by mechanics during the work process. Hence mopping is directly related to work duties.

Further, argued the Center, evidence did not support the union's assertion that for some MAN mechanics the mopping requirement ceased. In fact, mechanics always have been required to mop when necessary.

Issue: Did management violate Article XIV, Section 4 of the agreement by requiring MAN Division mechanics to mop their immediate work areas on a regular and recurring basis?

Award: Arbitrator Arnold O. Anderson denied the grievance.

Looking to Section 4, Anderson found that spending slightly over five minutes "to mop an area four by five feet once a day, with water and mop brought to the site would have to be termed minimal." He judged the mopping to be directly related to mechanics' duties.

Anderson said that the grievance settlement for MAI mechanics could not be held to apply to MAN mechanics.

Commenting that "other arbitrators have stated that past practice is established when proof is presented of a clear, repeated continuous practice mutually acceptable to both parties in an active, ongoing contract," the arbitrator did "not find past practice in the MAN Division to be present in this arbitration case."

And finally, he said, "the last sentence of the section does not preclude the employer from requiring mechanics to mop in and around their immediate work areas on a regular and recurring basis, in addition to requiring them to do so immediately following the dropping of some material of a noxious or toxic nature. It appears to the arbitrator that the second sentence of Section 4 which pertains to all employees in the bargaining unit is modified for shop personnel by the last sentence." (Sacramento Air Logistics Center, McClellan Air Force Base *and* AFGE Local 1857—November 17, 1979. LAIRS #12265)

The Federal Labor Relations Counsel

3 FLMC 80-6 March 28, 1980

Marshals Service Must Bargain On AFGE Proposal, Rules FLRA

"Nonnegotiable" was the U.S. Marshals Service's response to a union proposal that the Service "announce all vacancies for which bargaining unit employees are eligible to apply, regardless of how the vacancies are to be filled." But when the American Federation of Government Employees appealed its case, the Federal Labor Relations Authority found the proposal within the agency's duty to bargain.

The Service contended that the proposal does more than require management to inform the union of vacant positions. It also requires management to consider applications from unit employees as a precondition to making selections, even where management has decided not to fill positions through merit promotion. And, said the Service, an agency's right to use some other source is guaranteed under Section 7106(a)(2)(c) of the Federal Service Labor Management Relations Act.

AFGE asserted that its proposal is merely a procedure requiring the agency to announce vacancies, and that the law mandates negotiations on procedures used in implementing management decisions.

The Authority agreed with the union that the proposal did not interfere with management rights by requiring the agency to select from the unit. Instead it was based on the union's concern that employees be informed of the manner in which vacancies are to be filled.

"In light of its plain language and intended meaning, the proposal merely requires management to announce vacancies for which bargaining unit employees are eligible to apply, but does not require management to consider or select eligible applicants from within the bargaining unit in filling vacancies," the Authority said.

The FLRA added that the Service failed to demonstrate that the proposal is inconsistent with Chapter 335 of the Federal Personnel Manual or with management's right to fill first-level supervisory positions. The Authority accordingly ruled the proposal to be negotiable. (2 FLRA No. 96—February 29, 1980)

No Dues Is Bad News

Rejecting the recommendation of an administrative law judge that no unfair labor practice be found, the Federal Labor Relations Authority ruled that the refusal of the Department of Energy to withhold union dues for new members of the National Treasury Employees Union was improper and violated the agency's contractual obligation.

NTEU's contract with the former Federal Energy Administration, containing a dues checkoff provision, had an October 1, 1977 expiration date. Things got complicated when the Department of Energy was created on October 1, 1977, merging employees from the FEA and several other agencies. The Department of Energy declined to honor new dues withholding authorizations dated October 1 or after.

It was not until a year later, October 13, 1978, that the Assistant Secretary of Labor for Labor Management Relations determined that the Department was not a successor employer for NTEU. He held that the reorganization rendered NTEU's exclusive recognition inappropriate for the purpose of exclusive recognition under Executive Order 11491.

At issue in this case is DOE's decision not to process NTEU dues authorizations from October 1, 1977 to October 13, 1978.

The Authority concluded that DOE's action violated Section 19(a)(1) and (5) of the Executive Order. In the Authority's judgment, the agency should have adhered to the agreement, pending settlement of the representation petition. Rather than violating its neutrality as DOE claimed, continuing to honor the prior agreement in these circumstances would have been consistent with its obligation to maintain existing recognitions during the pendency of representation petitions, wrote the Authority.

Accordingly, the Authority overturned the administrative law judge's finding that DOE owed no duty to recognize NTEU. The Authority noted that because this was a carryover case, its decision was based solely on the Order. (FLRA No. 105—March 7, 1980)

Union Proposal Violates NLRB Rights

After studying a union proposal that the agency assign certain duties to the clerical assistant to the office manager only in the manager's absence, the Federal Labor Relations Authority ruled it nonnegotiable under Section 7106(a)(2)(B) of the Federal Service Labor Management Relations Statute. The proposal surfaced in negotiations between the National Labor Relations Board and Local 19 of the National Labor Relations Board Union.

The NLRBU wanted limitations on work responsibilities of the clerical assistant: the assistant would not determine the presence or absence of other employees; not prescribe appropriate action for late arrival or early departure; not conduct pre-hire interviews; not hold corrective, disciplinary or appraisal interviews; not make mandatory work assignments as opposed to routine distribution of work; not formulate or conduct labor relations. Only if appointed acting office manager would the assistant carry out these duties.

The Authority sustained the agency's allegation that the proposal interferred with its reserved management rights. The disputed proposal, noted the Authority, would establish a condition (the absence of the office manager) on management's ability to assign the work. (2 FLRA No. 98—March 7, 1980)

(Continued from page 1)

officer "appears to believe that he is free to target certain individuals for demotion without cause or explanation . . .[his] actions only serve to reinforce the appearance of an incompetent personnel officer assigning a personnel management specialist to cover the malevolent actions of the personnel officer with regard to attacks not only on the position of selected employees but also against the employee's right to representation and due process."

After investigation, management determined that the personnel officer had handled the situation properly and that the union official was not justified in using "incompetent" and "malevolent" to describe him. The VA issued a letter of reprimand to the president, stating that his attack on the personnel officer met the test of "deliberate and reckless untruth" beyond the protection of the Federal labor management relations programs, and that it was a violation of a VA regulation.

Affirming the decision of its Administrative Law Judge, the Authority noted that:

> A labor organization must be free to write and express itself in a grievance in terms which it feels, correctly or incorrectly, will most successfully accomplish its ends. To subject a union representative to discipline because he records a grievance in a way that displeases management, or because management believes the wording is incorrect or untruthful, would be to unreasonably limit and interfere with a labor organization's effectiveness. Such potential discipline would necessarily inhibit an employee, when acting in the capacity of a union official, from taking those actions which he might feel would most effectively represent the employees.

The FLRA observed that the employee "was merely utilizing traditional collective bargaining language in criticizing management . . . Management cannot be so thin skinned as to take offense." For these reasons, the Authority judged that VA had violated Section 19(a)(1) and (2) of the Order.

The Authority cautioned that its decision did not mean that an employee who is a union official is free to do and say what he wishes with impunity. Even though a union official must have broad latitude in speech and action, "there are some actions or statements that would be so extreme as to be unprotected." (2 FLRA No. 84—February 21, 1980)

Court Dismisses Petition For Review of Panel Order

The U.S. Court of Appeals for the Ninth Circuit has dismissed the Nevada National Guard's petition for review of an order of the Federal Service Impasses Panel because the Court lacks jurisdiction under Executive Order 11491. The court also held that the Panel's decision is not a final order of the Federal Labor Relations Authority and therefore not reviewable under 5 U.S.C. Section 7123.

In the case which triggered the appeal, the Nevada National Guard and National Association of Government Employees Locals R12-130 and R12-145 were ordered by the Panel to show cause as to why settlement language used by the Panel in previous cases involving the wearing of the military uniform issue should not be mandated in this dispute. After reviewing the parties' responses, FSIP directed them to adopt certain language in their agreement. Essentially, the Panel said that while performing their regular day-to-day duties, civilian technicians have the option of wearing either a military uniform or civilian attire. (Case No. 79 FSIP 68(a), April 2, 1979)

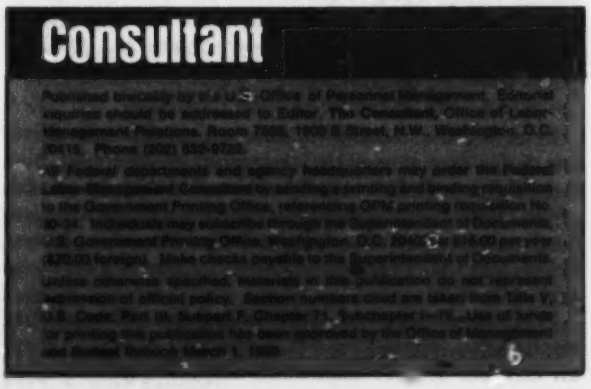
In a related matter, the Authority's General Counsel has issued a complaint alleging that the Nevada National Guard committed an unfair labor practice in violation of 5 U.S.C. 7116(a)(1) and (6) by its failure and refusal to implement the Panel's Decision and Order. The case is currently before the Authority. (Nevada National Guard vs. United States, 9-CA-49)

FLRA Declines to Go to Court To Enforce Arbitration Award

An American Federation of Government Employees' request to the Federal Labor Relations Authority that it enforce an arbitration award was turned down by the Authority. According to the union, U.S. Army Communications Command, Fort Huachua, Arizona, did not comply with the frequency of boiler safety inspections ordered by the arbitrator, and Local 1662 wanted the Authority to go to a court of appeals for enforcement.

The Authority gave several reasons for its denial of the union request. FLRA found no statutory basis for it to petition a U.S. Court of Appeals for enforcement of an arbitration award to which *no exception* had been filed with the Authority. There was no Authority issuance and order which the Authority might try to enforce under 5 U.S.C. Section 7123(b). Contrary to the union's reliance on legislative history of the statute, the FLRA did not find that the history supported labor's arguments.

The Authority further noted that the disagreement centered on whether the activity complied with the arbitration award, and the law provides other remedies for this type of dispute. If clarification or interpretation of an award arises in connection with compliance, the parties may request this from the arbitrator, or they may jointly submit the question of compliance to arbitration. In some situations the unfair labor practice procedure may be used to settle a dispute over alleged failure to abide by a final and binding arbitration award. (2 FLRA No. 101—March 7, 1980)



80-7

The Federal Labor-Management

Consultant

1 FLMC 80—7

April 11, 1980

United States of America
Office of
Personnel Management
Route to:

MAY 9 1980
U. S. GOVT. PUBS.
DEPOSITORY

New Developments Checklist . . .

Agency told to broaden scope of negotiated grievance procedure to cover EEO complaints . . . p. 1
Final DOL regulations on standards of conduct . . . p. 1
Panel orders Florida National Guard—NAGE to accept its recommendation on uniforms . . . p. 1
"Accidental possession" of marijuana in Naval shipyard arbitration case . . . p. 2
Most of ACT charges against Georgia National Guard dismissed by FLRA . . . p. 3
Panel selects employer's final offer in resolution of VA—NFFE bargaining dispute . . . p. 3
Bookshelf . . . p. 3
Tieline . . . p. 4
Authority finds VA committed ULP . . . p. 4

Broaden Grievance Scope, Says Panel

A union proposal to give employees the option of using either the negotiated grievance procedure or the statutory system for resolution of EEO complaints was the issue deadlocking negotiations between the Federal Energy Regulatory Commission and American Federation of Government Employees Local 421. The dispute, affecting 1,300 bargaining unit employees, was settled when the parties accepted a recommendation from the Federal Service Impasses Panel that their contract give employees this option.

The Panel also recommended further negotiations to make sure that the contractual procedure allows enough time for investigation and informal resolution of EEO complaints prior to institution of formal procedures. The parties should also decide whether to include or exclude class actions.

In defense of its proposal, AFGE characterized the statutory appeals system as inequitable, lengthy, cumbersome, inefficient and expensive. Prior to the Civil Service Reform Act, employees had to use the Government-wide statutory appeals route for EEO matters. The act, however, permits parties to negotiate an expanded scope of grievances as well as allowing employees with EEO complaints to choose between the statutory system and the negotiated grievence procedure (if the procedure covers discrimination complaints). AFGE reasoned that employees should benefit from changes permitted by the new statute.

The Regulatory Commission contended that EEO complaints should remain outside the scope of the negotiated grievance procedures because the existing system already provides a uniform method for resolution. Moreover, the union proposal has insufficient time for a full consideration of complicated matters and lacks procedures for handling class actions and mixed cases.

In making its recommendations the Panel noted that the broad-scope grievance approach was consistent with the statute's intent and legislative history. The Panel found valid the employer's questions regarding the proposal's adequacy of time and its exclusion of certain matters. (Federal Energy Regulatory Commission and American Federation of Government Employees Local 421—Case No. 79 FSIP 41, January 28, 1980)

A/SLMR Issues Final Regulations on Standards of Conduct for Unions

The Assistant Secretary of Labor for Labor-Management Relations has issued new regulations governing standards of conduct for labor organizations representing Federal employees. The new rules, effective April 7, implement Section 7120 of the Federal Labor-Management Relations Statute.

Standards of conduct are a code of behavior designed to ensure that labor organizations holding exclusive recognition are free from corrupt and undemocratic influences. They deal primarily with the rights of individual union members to democratic participation in union affairs and with the maintenance of fiscal integrity by the unions. The standards are similar to those required for unions in the private sector.

The Labor Department issued new regulations because its old rules, dealing with union conduct under Executive Order 11491, were superceded by the 1978 statute. There are, however, only minor changes in the new rules. (2 CFR Parts 201-209, Standards of Conduct for Labor Organizations in the Federal Sector, were published in the *Federal Register* of March 7, 1980.)

Uniforms Not Order of the Day, Panel Tells National Guard

When the employer refused to accept its factfinding recommendations, the Federal Service Impasses Panel reissued them as an order, directing the Florida National Guard and the National Association of Government Employees to resolve their bargaining impasse on the

(Continued on page 4)

PM 1.13:

The case discussion below illustrates how common problems are resolved through negotiated disputes-settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

Summer and Smoke

Casefacts: On a Saturday last August the electronics mechanic was not scheduled to work at the naval shipyard, but his wife was. He drove her to work in the morning and then took the car to a service station for a state inspection. (The car was still registered in his wife's maiden name since the couple were newly married.)

He picked up the car several hours later and drove to the shipyard to meet his wife and drive home. The mechanic left the car in the shipyard, unlocked, for about fifteen minutes while he went to his wife's office. The couple then drove off the base, with the husband at the wheel.

When they arrived at the gate, they thought the Marine guard waved them through. However, they had proceeded only a few feet when the wife noticed the guard gesticulating wildly. They immediately decided to return to the gate, but because of the street traffic pattern, they had to circle the block to do so.

When they reached the gate, the guard asked to search the car, a not unusual procedure, to which they readily assented. A second guard joined the search. After examining the glove compartment, one guard somewhat triumphantly displayed a small crumpled sandwich bag containing approximately three grams of marijuana.

Shipyard management imposed a ten-day suspension on the mechanic but no discipline on his wife. The Metal Trades Council took the case to arbitration.

The couple consistently denied any knowledge of how the bag and its contents came to be in the car, explaining that the car was unlocked and unattended at the service station and shipyard. Had they known of the bag's presence, they said, they could easily have disposed of it as they circled the block to return to the gate. They also pointed out that no smoking paraphernalia, such as rolling paper or pipe, was found, and suggested the possibility that the guard planted the bag.

Evidence showed that the grievant had a good record—in fourteen years he had had only one minor rule infraction.

The shipyard cited its regulation which lists the minimum penalty of a reprimand and the maximum penalty of discharge for "unauthorized possession of, or attempting to bring, intoxicants on Navy premises."

Management said that in imposing the suspension it also considered its memorandum to supervisors:

> In view of the widespread use of marijuana in the country, the more tolerant attitude of the courts, and increasing use in the shipyard, some guidelines are offered in meting out disciplinary action. The normal penalty for possession or use of marijuana during hours in the shipyard on a first offense is established at 10 days. Mitigating circumstances such as an excellent work performance record, or accidental possession, would serve to lessen the offense. Aggravating circumstances, such as smoking while on the job (which could lead to an unsafe or dangerous work condition), loafing, and poor work performance could serve to increase the seriousness of the offense.

Issue: Did the shipyard have just cause to suspend the grievant for ten days for possession of marijuana?

Award: Arbitrator Frederick U. Reel sustained the grievance, ordering that the grievant be made whole for losses sustained as a result of the suspension and that all references to it be eliminated from his personnel record.

"In the Arbitrator's view," judged Reel, "even if every disputed fact or inference were decided or drawn in favor of the shipyard, the most severe penalty that could possibly be justified in this case is a reprimand. The shipyard's own directive suggests that the 'normal penalty' of a ten-day suspension for a first offense may be mitigated by a showing of accidental possession or an excellent work performance record."

Arbitrator Reel took into account the mechanic's past work record. He also credited the testimony of the mechanic and his wife that this was a case of "accidental possession." Based on these facts, he found, management's own policy calls for nothing more than a reprimand.

The arbitrator added that the mechanic was not on duty, that he was at the shipyard solely to pick up his wife who worked there, and that the car was in her name, not his.

"In short," said Reel, "under the peculiar facts of this case, the grievant's employee status was purely coincidental, and if any reprimand was in order at all (a matter as to which the arbitrator expresses no opinion), it should have been directed at the wife who was on duty and in whose name the car was registered and the automobile pass to the shipyard was issued." (Norfolk Naval Shipyard *and* Tidewater Virginia Federal Employees Metal Trades Council—September 17, 1979. LAIRS #12177)

Georgia Supervisors Lose Checkoff

Finding the Georgia National Guard deficient in only one instance, the Federal Labor Relations Authority dismissed the bulk of the Association of Civilian Technicians' unfair labor practice charges. The union had filed a complaint when the Guard halted checkoff for twenty-two members of the bargaining unit represented by ACT.

The Authority determined that the activity had added supervisory duties to the position descriptions of twenty-one small shop supervisors. Overriding its Administrative Law Judge, the FLRA concluded that these twenty-one were supervisors under the meaning of Section 2(c) of Executive Order 11491. The remaining employee, who exercises no authority over subordinate employees, is not a supervisor and therefore entitled to dues withholding privileges, said FLRA.

The Authority accordingly found that in regard to this one employee the Guard violated Section 19(a)(1) of the Order by failing to accord appropriate recognition to ACT. It ordered the Guard to cease and desist.

As it always does in carryover cases, the Authority noted that its decision was based solely on the Order and as if the new Federal Service Labor-Management Statute had not been enacted. (2 FLRA No. 92—February 29, 1980)

Panel Selects VA's Final Offer

Using a final offer selection procedure, the Federal Service Impasses Panel resolved a bargaining impasse between Veterans Administration, Northport, New York and Local 387, National Federation of Federal Employees. The dispute was over the amount of official time to be granted a chief union steward, and the Panel directed adoption of the employer's final offer. (Case No. 79 FSIP 76, February 14, 1980)

The chief steward, a registered nurse, formerly worked a day shift, but his reassignment to staff nurse meant he could be scheduled for duty on any of three shifts. NFFE argued that because of the reassignment the steward is no longer readily available to bargaining unit employees.

The union's final offer was for the steward to get a minimum of twenty-four hours a week of official time, all of which would be scheduled during the day shift. It also proposed that the steward's number of hours would never fall below that granted to the chief steward of the American Federation of Government Employees, the other union at the hospital.

The employer, on the other hand, offered eight hours of official time per week, with scheduling determined by the chief of nursing service and the immediate supervisor. The VA further guaranteed that upon request it would schedule the eight hours of official time during a day tour.

In making its choice, the Panel noted that NFFE's proposal was not clearly drafted, and the exact amount of official time it sought was ambiguous. NFFE asked for twenty-four hours per week but also for parity with the AFGE steward who receives forty hours. In addition, the evidence did not support NFFE's contention that eight hours of official time is insufficient for the chief steward to carry out his union duties of representation. The Panel commented that in a continuous duty operation such as a hospital it is impossible to guarantee that the chief steward will always be available to personnel on all shifts.

Since their agreement will expire in July of this year, added the Panel, the parties will soon have an opportunity to bargain "on any problems which may arise under the Employer's proposal."

BOOKSHELF

Spot Reviews of Publications and Films

Now available for purchase are two reference publications prepared by OPM's Office of Labor-Management Relations. The publications summarize third party case decisions in the Federal sector.

•*Index of Federal Labor Relations Cases*, October 1979, PB80-131873, $17.00. This is a cumulative index of arbitration awards, all rulings of the Federal Service Impasses Panel and Federal Labor Relations Authority, and selected decisions of the Comptroller General and the former Federal Employees Appeals Authority. It also has case determinations of the Federal Labor Relations Council and the Assistant Secretary for Labor-Management Relations issued under Executive Order 11491. (Relevant decisions of the Merit Systems Protection Board and the courts will be included in future issues.) All decisions are indexed by subject matter. This *Index* supercedes the July 1979 edition.

•*Digest of Labor Arbitration Awards in the Federal Service, Supplement No. 5*, October 1979, PB80-131477, $7.00. The *Digest* of March 1978 and its five supplements have summaries of Federal arbitration awards contained in the LAIRS files. They list each award by subject matter, issue, date, parties and arbitrator.

To order, write or call the National Technical Information Service, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161, (telephone 703-557-4693) using the purchase numbers.

The Federal Service Impasses Panel

The Federal Service Impasses Panel reports on a variety of actions it took in eight cases.

In a Federal Election Commission—National Treasury Employees Union dispute, the Panel refused to reconsider its decision not to approve a request for outside binding arbitration of future negotiation impasses. The Panel concluded that a negotiation impasse must be in existence and voluntary arrangements to resolve it must be exhausted before the Panel may act under Section 7119(b)(2) of the Federal Service Labor-Management Relations Statute. The Panel has no authority to approve a procedure for outside arbitration of bargaining impasses which are not in existence, but may arise in the future. The Panel further noted that under FSIP regulations, Sections 2471.3(b) and 2471.6(b), it may give expedited consideration to requests for approval arising from procedures in a previously negotiated labor agreement—FEC, Washington, D.C. and NTEU (Case No. 79 FSIP 54, January 29, 1980).

Negotiation impasses were settled with the assistance of a Panel-designated factfinder. The issues involved were:

•Mid-term negotiations—Transportation, Federal Aviation Administration, Los Angeles Air Route Traffic Control Center, Palmdale, California and National Association of Government Employees Local R12-293 (Case No. 79 FSIP 95, January 30, 1980).

•Negotiations, safety and health, leave, facilities and services, travel and per diem, hours of work, grievance procedure, upward mobility program and employee improvement program—Army Corps of Engineers, New Orleans District, New Orleans, Louisiana and National Federation of Federal Employees Local 1124 (Case No. 79 FSIP 92, January 21, 1980).

The Panel directed that a factfinding hearing be held, but the parties reached a voluntary settlement of an impasse concerning alternative work schedules prior to the prehearing conference—General Services Administration, National Capital Region, Washington, D.C. and American Federation of Government Employees Local 2151 (Case No. 79 FSIP 91, January 23, 1980).

The Panel declined to assert jurisdiction after it was established that the Energy Department's Los Alamos Area Office is part of the Albuquerque Operations Office which reports directly to the Assistant Secretary for Defense Programs. Executive Order 12171 excludes Energy's Offices of the Assistant Secretary for Defense Programs from coverage under Chapter 71 of U.S.C. Title 5—Energy, Los Alamos, New Mexico and AFGE Local 2118 Security Inspectors Unit (Case No. 79 FSIP 45, January 21, 1980).

Withdrawal of requests for its assistance were approved by the Panel in:

•Army, Rock Island Arsenal, Illinois and International Association of Tool Craftsmen Local 1 (Case No. 79 FSIP 115, January 7, 1980).

•Treasury, U.S. Customs Service, Region IV, Miami, Florida and NTEU Chapters 137 and 146 (Case No. 79 FSIP 42(a), January 21, 1980).

•Treasury, U.S. Customs Service, Region IV, Miami, Florida and NTEU (Case No. 79 FSIP 43(a), January 21, 1980).

(Continued from page 1)

basis of prior FSIP recommendations.

The major issue concerned the *option* of Guard technicians to wear civilian clothing while performing routine day-to-day tasks. National Guard management held out for the *requirement* of military uniforms. The Panel recommended that the parties adopt contract language affording technicians the option, with exceptions for occasions when uniforms might be required.

The second issue was a union proposal on flexitime and compressed workweeks. FSIP's recommendation that the union withdraw its proposal was accepted by both parties. (Florida National Guard and National Association of Government Employees Local R5-91, R5-107 and R5-120—Case No. 78 FSIP 100, January 2[illegible], 1980)

Employer Asked Wrong Question, Authority Rules in ULP Case

Finding that management at the Veterans Administration Hospital, Temple, Texas unfairly interrogated the chief union steward as to whether she would file a grievance if she were not promoted, the Federal Labor Relations Authority ruled the activity in violation of Executive Order 11491. The unfair labor practice complaint was filed by Local 2109 of the American Federation of Government Employees.

The Authority further judged that VA did not violate the Order by asking the employee about her ability to function as a supervisor since, if promoted, she could no longer perform union duties. "Since the steward might be promoted to a supervisory position, the Employer was entitled to ascertain whether she expected to continue her representational duties," said the Authority.

The FLRA also found that VA showed no anti-union bias when it did not select the chief steward for the supervisory position. The record, according to the Authority, revealed that the steward was less qualified than the employee who received the promotion. (2 FLRA No. 94—February 29, 1980)

Consultant

Published biweekly by the U.S. Office of Personnel Management. Editorial inquiries should be addressed to Editor, The Consultant, Office of Labor-Management Relations, Room 7305, 1900 E Street, N.W., Washington, D.C. 20415. Phone (202) 632-6752.

All Federal departments and agency headquarters may order the Federal Labor-Management Consultant by sending a printing and binding requisition to the Government Printing Office, referencing GPO printing requisition No. 40-34. Individuals may subscribe through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, at $18.00 per year ($22.50 foreign). Make checks payable to the Superintendent of Documents.

Unless otherwise specified, materials in this publication do not represent expression of official policy. Section numbers cited are taken from Title 5, U.S. Code, Part III, Subpart F, Chapter 71, Subchapter I—IV. Use of funds for printing this publication has been approved by the Office of Management and Budget, Bulletin [illegible].

80-8

The Federal Labor-Management

Consultant

1 FLMC 80-8

April 25, 1980

Office of Personnel Management

Route to:

New Developments Checklist . . .

Panel recommendations settle dispute over ground rules for negotiations by Fort Sill—NFFE . . . p. 1

EPA should not question union official about his "present and anticipated role," rules Authority . . . p. 1

Employer's final offer selected by FSIP in SSA—AFGE bargaining impasse . . . p. 1

Did employer have just cause to discharge three employees at Army Exchange snack bar? . . . p. 2

Figures on extent of union representation in Federal sector are released by OPM . . . p. 3

Tieline . . . p. 4

FASTA violated EO 11491 when it denied services of attorneys to non-union members of bargaining unit . . . p. 4

NEWARK PUBL'C LIBRARY

MAY 16 1980

U. S. GOVT. PUBS. DEPOSITORY 576

Panel Settles Ground Rules Dispute

The Federal Service Impasses Panel reports that based on its recommendations, a union and employer have agreed on ground rules for negotiations. An Army facility at Fort Sill, Oklahoma and the National Federation of Federal Employees, which began discussing ground rules in May 1979, were at a stalemate on four issues. For the first issue the Panel suggested a compromise between labor's proposal and management's. On the other three issues it recommended that NFFE's proposals be accepted.

Issue number one concerned time spent at the bargaining table each week. The Army wanted two four-hour days, the union sought forty hours, and the Panel recommended three consecutive eight-hour days. FSIP felt its recommendation would encourage "sustained and productive negotiations." It cautioned the parties to consider twenty-four hours as a minimum and to be flexible about negotiating over the amount of time.

Pay status became the second item in dispute when the activity wanted to limit bargaining to normal duty hours while the union preferred contract silence on this point. The Panel found that part of the employer's proposal is already covered by the Federal Service Labor-Management Relations Statute. Moreover, said FSIP, collective bargaining should not be confined to a rigid schedule. The Panel accordingly recommended omission of Army's proposal from the ground rules agreement.

On the third issue, the Army wanted the parties to exchange finished proposals on all matters before the start of the first bargining session, with no further proposals brought up unless both parties agreed. The union, however, wanted no such limitations. The Panel commented that the employer's proposal was too restrictive and could have "a chilling effect on negotiations." Since an obligation to prepare an agenda in advance of each meeting would produce similar results, the Panel recommended adoption of the union's approach.

Lastly, the Army sought to have the ground rules agreement apply to any negotiations which might occur during the term of the agreement. The union preferred to negotiate a separate contract provision to cover ground rules for any supplemental contracts. FSIP recommended adoption of NFFE's proposal. *(U.S. Army Field Artillery Center, Fort Sill, Oklahoma and National Federation of Federal Employees Local 273—Case No. 79 FSIP 75, February 20, 1980, Release No. 139.)*

PM 1.13:

All Things Considered

The Federal Labor Relations Authority found the Environmental Protection Agency guilty of an unfair labor practice when it asked the union treasurer to report his "present and anticipated role in union activities." However, for valid reasons the activity may request an employee to estimate the *amount of work time* he anticipates spending on union activities, the Authority added. The charge that EPA interferred with the protected rights of employees under section 19(a)(1) of Executive Order 11491 was brought by the American Federation of Government Employees Local 3331.

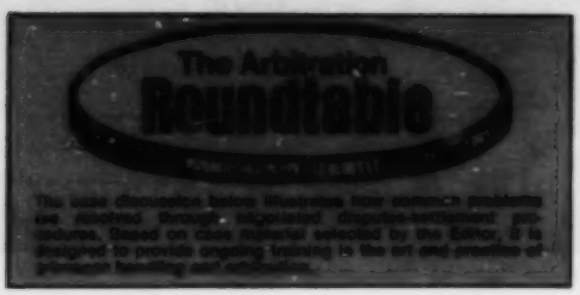
The Authority noted that its decision was based solely on the Order and as if the new Federal Service Labor-Management Relations Statute had not been enacted. *(2 FLRA No. 102—March 7, 1980)*

SSA—AFGE Impasse Resolved

Selection of the employer's final offer by the Federal Service Impasses Panel settled a bargaining dispute between the Social Security Administration, Milwaukee, Wisconsin and the American Federation of Government Employees. The impasse concerned employee protection and procedures for dealing with disruptive claimants.

The union proposed, among other things, that if a disruptive claimant was escorted into a private office and did not calm down within three minutes, the police should be called. According to AFGE Local 1346, it is

(Continued on page 4)



Early Closing Time

Casefacts: One evening around 8:30 p.m. the retail manager of an exchange store at Fort Jackson, South Carolina noticed that the adjacent snack bar had closed early. The lights were dimmed, the employees had left, and their cars were gone from the parking lot. (The official closing time of the snack bar is 9:00 p.m., but employees are scheduled to work until 9:30 cleaning up.) Clerks in the retail store had previously asked the manager if she was aware that the snack bar had been closing early.

The retail manager reported all this to the food activity manager who asked her to continue checking. On five subsequent evenings she observed that the snack bar was closing early.

The sixth night, April 12, a snack bar employee came to tell the retail manager that a tank of CO_2 had exploded. She saw that his knees and elbows were skinned, and offered to make out an accident report. He declined, saying that if one needed to be made out, he would do it. He did not say that he was injured or ask to go home.

That same evening an exchange detective saw the employees cleaning up around 8:00, then lock the door and go to their cars. When he asked why they were leaving early, they answered that there had been no customers. One female employee admitted they did not have permission to leave early.

The other employees said they could not reopen because the gas tank had exploded in the face of one of them. The detective asked if he were hurt and would like to go to the hospital. The employee said no, added that he did not "have to take that kind of crap," got into his car and drove off. The detective then brought the two women back to reopen the snack bar.

After examining the damaged tank, the detective advised the women that an incident report should be filed that night. They told him that they did not believe the other employee was injured.

Management discharged the employees on charges of having closed the snack bar early on several occasions and of falsifying time and attendance records. Their exclusive representative, American Federation of Government Employees Local 1909, took the case to arbitration.

Issue: Whether under the evidence produced before the arbitrator, the employer had just cause to separate three workers from employment.

The grievants testified at the arbitration hearing that the retail manager's account "must be some kind of trick she was playing" since the snack bar had never closed early except on April 12.

When the tank blew up, they said they had tried several times to reach the food service manager by phone for permission to close, but were unable to reach her. The women testified that the male employee had been nervous and pale from the accident. Although his elbow was injured and his pants leg was torn, he did not want to go to the hospital. He took sick leave the next day.

The grievants also stated that when they worked overtime, they received compensatory time off, but only left early when authorized to do so. They could not remember whether or not they took compensatory time during the period in question. These statements directly conflicted with the food service manager's testimony that she had authorized neither early closing nor compensatory time.

A store clerk confirmed the retail manager's report of early closings. On two occasions during the period in question, she had observed that the folding doors to the snack bar were chained shut.

A payroll clerk testified that the employees had signed the time sheets as verification that they had worked the hours shown.

Award: The arbitrator, John W. Kennedy, found that under the evidence presented, the employer had just cause to separate the workers from employment.

Because the charges and the penalty were so serious, he said, "for the employer's position to be sustained there must be proof beyond a reasonable doubt. I think that this standard has clearly been met."

Arbitrator Kennedy judged that even if the grievants were granted the benefit of the doubt for April 12, there remained the unshaken testimony of the retail manager and clerk that the snack bar closed early on other occasions.

No one claimed that either witness had any reason for animosity against the grievants, he noted, and extensive cross examination by the union did not shake their firsthand accounts.

"Thus, if I am to conclude that the grievants' accounts of the events are accurate, I am thereby forced to conclude that the retail manager and clerk are guilty of having deliberately fabricated lies aimed at entrapping the grievants and causing them to lose their livelihood, a conclusion I would have to draw without one shred of evidence that either lady had any motive whatsoever for manufacturing these lies.

"Obviously I cannot draw such a far-fetched conclusion, for I am convinced that they have told the truth." *(Army and Air Force Exchange Service, Fort Jackson Exchange, South Carolina and American Federation of Government Employees Local 1909—December 30 1979. LAIRS 12260*

The Federal Labor Relations Counsel

3 FLMC 80-8 April 25, 1980

Union Recognition Rises in Federal Service

The number of Federal workers represented by unions (exclusive of Postal Service) reached an all-time high of 1,245,988 last year. Sixty-one percent of the Federal workforce now has unions bargaining for it, according to data compiled by the Office of Personnel Management.

Negotiators spent a busy year, and the number of employees covered by agreements increased to 1,148,822—an advance of 28,496. By November 1979, 56 percent of employees were covered by agreements.

Blue-collar workers were more highly represented than white-collar. Eighty-one percent of total blue-collar were in exclusive units, compared with 55 percent of white-collar employees.

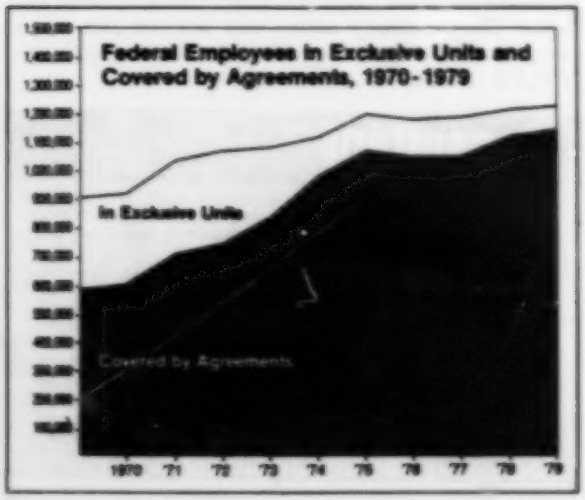
The trend toward fewer but bigger bargaining units was demonstrated by the 3,081 units in 1979 as contrasted with 3,328 in 1978. A major consolidation within the Social Security Administration contributed largely to the reduction. The average unit contained 404 employees.

Representation by Major Unions

Two of the six major unions had a jump in representation, while the other four declined. The American Federation of Government Employees, AFL-CIO, increased its representation by 8,755 to 696,720 in the period ending November 1979. The National Treasury Employees Union added 5,400 for a total representation of 104,389.

The National Federation of Federal Employees represented 136,129 employees, a decrease of 2,543. The National Association of Government Employees decreased from 78,421 to 77,844. The AFL-CIO Metal Trades Council's representation dropped from 65,088 to 63,006, while the International Association of Machinists, AFL-CIO, diminished from 35,373 to 34,209 workers.

OPM notes that these representation figures mean the number of employees for which a union bargains; the figures do not mean that all employees in the bargaining unit are members. The percentages are related to total employment, including employees not eligible for union representation under Title VII of the Civil Service Reform Act.



Non-Appropriated Fund Activities

In non-appropriated fund activities, recognition units increased by 6 to a total of 325. Employees covered decreased by 1,182 (2 percent) t0 70,112. These activities had 259 units with agreements covering 58,000 employees.

Postal Service

The Postal Service also showed an increase in employees in exclusive recognition units—from 576,309 in 1978 to 585,751 in 1979. Representation remained at 89 percent of total Postal employment.

When Postal and non-Postal data are combined, the total coverage under exclusive recognition becomes 1,831,721. In 1979, 68 percent of all Postal and non-Postal employees were represented by unions, inching up from the 67 percent represented in 1978.

Book to be Published

OPM's summary on union representation was released on March 28. More detailed statistics will be published later in a Federal Personnel Manual Bulletin and in a book titled *Union Recognition in the Federal Government*. The book will contain a complete listing of all recognitions in the Executive Branch, Government-wide, and the Postal Service.

Exclusive Recognition, by Major Unions, November 1979

Union	Recognition Units	Employees Represented	Percent Change in Employees Represented 1978-1979
AFGE	1,470	696,720	+1%
NFFE	631	136,129	-2%
NTEU	20	104,389	+5%
NAGE	250	77,844	-1%
MTC	50	63,006	-3%
IAM	88	34,209	-3%

The Federal Service Impasses FIE LIN

Bargaining impasses have been resolved in several cases pending before the Federal Service Impasses Panel. (FSIP Release No. 141)

Assistance by a Panel-appointed factfinder prior to the hearing led to voluntary settlements in two cases involving the following issues:

•Official time, facilities and services, leave, equal employment opportunity, promotions, discipline, performance evaluation, grievance and arbitration procedures, and dues withholding—General Services Administration, National Archives and Records Service, Washington, D.C. and American Federation of Government Employees Local 2578 (Case No. 79 FSIP 96, February 6, 1980).

•Work equipment, official time, working conditions, disciplinary actions, job descriptions, overtime, relief work, notification of job openings, and tours of duty—Agriculture, Meat Grading Branch, Washington, D.C. and AFGE (Case No. 79 FSIP 37(a), February 14, 1980).

A settlement was reached by the parties on reduction-in-force, promotions and time reports prior to formal action by the Panel—Defense Language Institute, Foreign Language Center, Presidio of Monterey, California and National Federation of Federal Employees Local 1263. (Case No. 79 FSIP 111, February 5, 1980).

In a fourth case the parties also settled a dispute concerning the grievance procedure without Panel intervention— Veterans Administration Medical Center, Montrose, New York and AFGE Local 1119 (Case No. 79 FSIP 108, February 15, 1980).

In three other cases the Panel declined to assert jurisdiction because of threshold questions concerning the employer's duty to bargain:

•U.S. Naval Oceanographic Office, Bay St. Louis, Mississippi and AFGE Local 1028 (Case No. 79 FSIP 101, February 12, 1980).

•Carswell Air Force Base, Texas and AFGE Local 1364 (Case No. 79 FSIP 103, February 12, 1980).

•Internal Revenue Service, Dallas District, Texas and National Treasury Employees Union Chapter 46 (Case No. 79 FSIP 100, February 14, 1980).

(Continued from page 1)

rare for a week to go by without an employee being threatened. Specific procedures are needed for hostile situations, and the employer's proposal is too vague regarding supervisory responsibility, the union argued. In addition, discussions at safety committee meetings do not preclude the union from negotiating over the substance of the Office Safety and Employee Protection Plan.

SSA argued that its proposal reflects a fully operative and long-standing office policy, and the union's additional wording serves no purpose. Management maintained that this type of situation occurs infrequently.

Both proposals recommend the use of "tact, patience and diplomacy" to resolve most problem interviews. They suggest keeping away from the interview any items like hole punchers or paperweights which might be used as a weapon.

The Panel, after studying written submissions by both parties, used the final offer selection procedure to make a binding decision. *(SSA, Milwaukee, Wisconsin and AFGE Local 1346, Case No. 79 FSIP 73(a) February 14, 1980—Release No. 138).*

Giving the Cold Shoulder to Non-Members Is Union ULP

Affording representation by attorneys to union members but not to non-union members of a bargaining unit is unfair, determined the Federal Labor Relations Authority. The complaint by three FAA employees charged the Federal Aviation Science and Technological Association Division, National Association of Government Employees, with establishing a policy of disparate treatment based solely on union membership. The Authority agreed with the employees that such treatment violated unfair labor practice section 19(b)(1) of Executive Order 11491.

In February 1977 the union's newsletter published notice that henceforth only members would be represented by an attorney in grievances, reclassification and promotion complaints, civil service and federal court appeals, etc. "We are obliged to give you local representation only—but without national attorneys (a fellow employee will represent you). We *will not* handle cases before the Civil Service Commission or the courts."

To make sure they got the message, the FASTA regional president wrote the three employees: "As you no doubt are aware, the cost for arbitration will run the union approximately $1,000 . . . Surely you do not expect the present members to have to go it alone while some FAA employees go along for the ride, not providing their fair share by becoming members. I'll be glad to forward you . . . application forms for you to sign so that I may process your grievance into the national Headquarters."

In making its decision the Authority drew upon an earlier case *(1 FLRA No. 104)*. The earlier decision declared disparate treatment to be "inconsistent" with the obligations of an exclusive representative to represent all employees in the unit without discrimination and without regard to union membership.

The Authority accordingly adopted the findings of its administrative law judge and told FASTA to cease and desist. The Authority added that because this was a carryover case, its ruling was based solely on the Order. *(2 FLRA No. 103—March 7, 1980)*

80-9
The Federal Labor-Management
Consultant
1 FLMC 80-9 May 9, 1980

United States of America
Office of Personnel Management
Route to:

New Developments Checklist . . .

Authority proposes new rules concerning negotiability . . . p. 1
SUPSHIP — AFGE told by Federal Service Impasses Panel to resume bargaining on flexitime . . . p. 1
Anti-union bias found at VA . . . p. 1
Was mechanic's refusal to obey work order a reasonable fear for safety or was it insubordination? . . . p. 2
Calendar of Federal sector bargaining in July-December . . . p. 3
FMCS recommends new regulations . . . p. 4
CSRA impacts on grade and pay retention in downgrading . . . p. 4

MAY 23 1980
U. S. CO.
DEPOSITORY

PM-13;

Authority Proposes Amended Rules to Expedite Negotiability Issues

The Federal Labor Relations Authority recently proposed changes in its procedures facilitating court review and compliance action concerning negotiability disputes. The amended rules provide that FLRA's negotiability decision will include an order — either directing bargaining or dismissal or indicating the issue is permissively bargainable. Under the new rules, compliance procedures will also apply to orders issued in negotiability matters.

The issue as to whether a negotiability decision constitutes a final order of the Authority, subject to judicial appeal or enforcement, arose in connection with an agency action seeking court review (AFGE, Local 1999 and AAFES, Dix-McGuire Exchange, Fort Dix, New Jersey, 2 FLRA 16). The Authority originally opposed the agency's appeal on the grounds that a negotiability decision could not be appealed to court since it did not constitute a "final order" within the meaning of judicial review provisions of Title VII. It later withdrew its petition and, consistent with the position taken by agencies and unions, concurred with the court's jurisdiction.

The proposed rules, which appeared in the *Federal Register*, April 14, 1980, would revise FLRA regulations to conform with this action and to facilitate compliance activity. Interested parties have until May 30 to comment.

It Goes Like It Goes

Back to the bargaining table on flexitime, the Federal Service Impasses Panel told the Navy Department's Shipbuilding and Repair (SUPSHIP) facility at Groton, Connecticut and the American Federation of Government Employees Local 2105. The Panel's recommendation was accepted by the parties, thus resolving the negotiation impasse.

During negotiations AFGE presented several plans for flexible work schedules, but the activity opposed any form of flexitime. In its written submission to the Panel, however, the union dropped flexitime and instead proposed a compressed work schedule of four days a week, ten hours per day.

AFGE asserted that a compressed workweek would improve morale by allowing workers to avoid rush hour traffic, participate in more community events, and shop during off-hours. Compressed time would benefit management by reducing absences, lessening turnover, eliminating tardiness, and improving productivity. The local argued that meetings with contractors' representatives, usually two hours or less, can be scheduled in advance.

SUPSHIP responded that unit employees must be available to meet with representatives and facility employees who work on fixed five-day schedules. There was already a lack of back-up personnel, and variable work schedules would further aggrevate the problem. SUPSHIP proposed that unit employees be allowed to vary their official 7:55 a.m. starting time by thirty minutes before or after.

The Panel determined that a compressed workweek was not appropriate since it reduced opportunities for engineers to meet with contractor employees and might impair SUPSHIP operations. FSIP did, nevertheless, accept the union's listing of benefits of flexitime.

The Panel noted that most SUPSHIP personnel and contractors' employees work between 7:30 a.m. and 4:30 p.m., with the bulk of the engineers' contacts between 9:00 a.m. and 3:30 p.m. In the Panel's view, a limited flexitime program with a core period of six and one-half hours would not impair the facility's efficiency.

"The parties have not devoted much time to bargaining over the details of a flexitime program," the Panel said, and it recommended that the parties resume negotiations, using FSIP's comments as a basis for discussion. *(Navy, Supervisor of Shipbuilding, Conversion and Repair, Groton, Connecticut and AFGE Professional Unit Local 2105 — Case No. 79 FSIP 60, February 21, 1980, Release No. 140)*

Let the Competition Beware

Anti-union bias exists at the Lexington, Kentucky Veterans Administration Hospital, determined the

(Continued on page 4)

Itiskit, Itaskit, A Man in a Yellow Basket

Casefacts: On June 2, 1978 the maintenance mechanic, a worker at Federal Aviation Administration, stood nervously by the manlift boom. His supervisor had just ordered him to work in the manlift and threatened him with suspension if he refused. The mechanic decided to disobey, feeling the boom and its basket were not safe. He received a five-day suspension for insubordination, and his union, the Federal Aviation Science and Technological Association, took management's action to arbitration.

At the arbitration hearing the foreman testified that the lift's August 1977 safety certification called for certain repairs. The repairs were made, but a year later, after the grievant's suspension, the safety inspector noted the same problems.

The grievant testified regarding an April, 1978 incident when he initially refused to work in the lift because of its unsafe condition. Although he complied with the foreman's order, he became so frightened that he asked to be brought down. The lift made a loud grating noise when the beam was extended, and the turntable on which the boom sat was badly tilted.

In May the grievant flatly refused to work on the boom. A field mechanic chief then inspected the boom on June 1 and said that although the lift needed some maintenance work, it was not unsafe. The agency safety inspector examined the lift on June 7 and found it safe. The inspector did not actually operate the lift but gave it a visual inspection and shook various parts.

In the fall of 1978 the grievant filed an unsatisfactory condition report because he felt none of the lift's safety discrepancies had been repaired. Some hydraulic lines were chafed and in danger of breaking. An oil leak threatened to stall the engine unless a spark plug was cleaned every few hours. According to the grievant, these things created severe safety hazards.

A field maintenance leader reported that he worked on repairing the lift in October and found it unsafe and unuseable.

The grievant's co-worker advised that he too was afraid of the lift, but did not want to complain because he was a probationary employee. His apprehension stemmed from the boom's grating noise and the shaking of the basket when being extended. Several times he had found loose bolts at the connection between the basket and boom.

Other management and union witnesses spoke of malfunctions in August 1978.

The activity argued that the mechanic had no reasonable grounds to refuse an order because the lift had a safety certificate and two supervisors found it safe.

FASTA contended that the grievant was reasonable in his fear that the manlift was unsafe and within his rights to refuse to work on it.

Issue: Was the disciplinary action taken against the grievant for just cause?

Award: Adolph M. Koven, the arbitrator, found for the grievant and ordered FAA to repay him five day's pay.

The arbitrator noted that the issue was whether "the work was sufficiently dangerous that the grievant could reasonably believe he was subject to extraordinary and unncecessary dangers. The agency's position is that he should have obeyed first and grieved later. However, a generally recognized exception to that rule is that the employee has the right to refuse to work under unsafe conditions.

"The employee bears the burden of proving that at the time he refused to work he reasonably believed the work assignment was dangerous. He believed that the anomalies found in the August 1977 report has not been fixed, and that belief was reasonable under the circumstances. He had experienced a situation in April where his safety was in jeopardy and a situation which did not include any intervening repair.

"After the lift was inspected by the safety inspector and declared safe, a legitimate question could then be raised that the grievant's refusal was not reasonable. However, this question was not presented in this dispute; the grievant's complaint occurred prior to the inspection and was based upon the condition of the lift at the time. For these reasons, the grievant's fear cannot be characterized as unreasonable."

Arbitrator Koven added that evidence which concerns events *after* the incident is not relevant. *(FAA Field Maintenance Party, FMP Rancho Cordova, California and FASTA—July 5, 1979. LAIRS #12078)*

Homework: In *How Arbitration Works* by Elkouri and Elkouri, the authors explain that safety can be an exception to the "obey-now—grieve-later" doctrine. Arbitrators frequently take the "reasonable man" approach and try to ascertain whether the facts and circumstances known to the employee at the time of the incident would cause a reasonable man to fear for his safety or health.

FEDERAL BARGAINING CALENDAR

OPM's Office of Labor-Management Relations reports that 506 bargaining agreements will expire during the last half of calendar year 1980. These contracts cover 151,606 employees in non-postal Federal bargaining units, including units at the Government Printing Office, Library of Congress, and District of Columbia Government. Of the 506 contracts, 342 can be automatically renewed. About 90 contracts are for two and three year terms.

The calendar below shows the expiration dates of major agreements found in the report, parties to the agreement, number of employees covered, and type of contract. "Auto-open" means agreements containing a fixed initial duration with an automatic renewal not limiting the number of renewals or the length of renewal periods. "Auto-limited" means automatic renewal agreements which limit either the number of renewals or the length of renewal periods.

The complete report, *Labor Agreement Expirations in the Federal Service—July 1, 1980-December 31, 1980,* OPM/OLMR 79/12 can be purchased from the National Technical Information Service, U.S. Department of Commerce, Springfield, Virginia 22161 (telephone number 703-557-4693).

	Parties	Employees Covered	Type of Agreement
JULY			
4	Naval Avionics Facility, Indianapolis, Ind.—AFGE 1744	1,604	3 years
7	Marine Corps Devel. and Educ. Command, Quantico, Va.—AFGE 1786	1,108	3 years
12	VA Hospital, Hines, Ill.—SEIU 73	1,327	auto-open
13	Naval Military Sealift Command, Oakland, Calif.—SIU	1,445	3 years
14	Naval Supply Center, Norfolk, Va.—AFGE 53	1,400	3 years
21	Portsmouth Naval Shipyard, N.H.—MTC	5,235	3 years
22	Marine Corps, Camp Lejeune, N.C.—AFGE 2065	1,585	2 years
28	U.S. Military Academy, West Point, N.Y.—AFGE 2367	2,259	auto-open
AUGUST			
4	GSA, Federal Supply Service, Washington, D.C.—NFFE 1642	1,300	auto-open
5	Naval Supply Center, Norfolk, Va.—IAM 97	1,500	3 years
8	McGuire AFB, N.J.—AFGE 1778	1,202	auto-limited
11	Pearl Harbor Naval Shipyard, Hawaii—MTC	5,356	indefinite duration
11	VA Hospital, San Diego, Calif.—SEIU 102	1,143	not available
21	USA Missile Command, Redstone Arsenal, Ala.—AFGE 1858	5,809	auto-open
22	DLA Defense Depot, Ogden, Utah—AFGE 2721	1,425	3 years
31	Bureau of Engraving and Printing, Washington, D.C.—IAM 174	1,416	auto-open
SEPTEMBER			
11	Sheppard AFB, Tex.—NFFE 779	1,121	auto-limited
14	Watervliet Arsenal, N.Y.—NAGE 298	1,979	auto-limited
15	USA 7th Infantry Div. Med. Dept., Fort Ord, Calif.—AFGE 2082	1,619	auto-open
24	EPA Headquarters, Washington, D.C.—AFGE 3331	2,250	auto-open
26	Patrick AFB, Fla.—AFGE 2568	1,165	auto-open
29	AF 1143d AB Sq., Washington, D.C.—AFGE-GAIU	2,296	auto-limited
OCTOBER			
5	GSA Public Building Service, Washington, D.C.—AFGE 2456	1,441	auto-open
16	VA Hospital, Lexington, Ky.—NAGE 5184	1,320	auto-open
19	GSA Region 3 Residual Unit, Washington, D.C.—NFFE 1800	1,275	auto-open
26	VA Hospital, Coatesville, Pa.—NAGE 335	1,184	auto-open
31	USA Military Personnel Center, Alexandria, Va.—AFGE 2	1,557	auto-open
31	VA Hospital, East Orange, N.J.—NFFE 1154	1,204	auto-open
NOVEMBER			
6	Bureau of the Public Debt, Washington, D.C.—NTEU	1,712	auto-limited
16	Kirtland AFB, N.Mex.—AFGE 2263	1,284	auto-limited
DECEMBER			
6	Bonneville Power Admin., Portland, Oreg.—CPTC	1,266	not available
14	Bureau of the Mint, Nationwide—AFGE	1,609	3 years
21	VA Center, Bay Pines, Fla.—AFGE 547	1,347	auto-open
26	Mare Island Naval Shipyard, Calif.—IFPTE 11	1,327	auto-open
27	VA Hospital, Long Beach, Calif.—NFFE 541	1,747	auto-open

Federal Labor Relations Authority, and it ordered the activity to mend its ways. The Authority found that hospital management demonstrated "a consistent pattern and design intended to discriminatorily exclude selection of union members as chief of police." The unfair labor practice complaint was brought by Local R5-185, National Association of Government Employees.

The chief of engineering service interviewed five highly qualified candidates from the bargaining unit for the police chief vacancy. Four of the candidates were union officers and members, and the fifth had recently dropped his membership. The engineering chief asked each of the five if he were a member and about prior union activity. The non-union candidate received the promotion.

The candidates were well aware that the former police chief had stongly stated on numerous occasions that the only way to be selected as supervisor in the police section was to be a non-member of the union. The chief also told one of the union candidates that he had recommended the non-union member as a replacement. In addition, the engineering chief admitted that the previous police chief had told him several times that their problems were attributable to the union.

The Authority's administrative law judge noted that in evaluating the non-union police officer the engineering chief gave no consideration to a recent incident which began with the officer issuing a traffic ticket and escalated into his arresting the motorist for disorderly conduct. The engineering chief also failed to consider the officer's attendance record containing a write-up for tardiness only a few weeks before the job interviews.

All these things added together, said the ALJ, support the employees' view that union membership was detrimental to advancement.

The Authority accordingly told management to refrain from referring to union membership and activity in promotion interviews. Further, VA was to cancel the selection of the non-union member as police chief and give him no credit for supervisory experience gained while he held the position. And lastly, VA was to repost the position of police chief.

Because this was a carryover case, the Authority's decision is based solely on former Executive Order 11491 and as if the Federal Service Labor-Management Relations Statute were not enacted. *(2 FLRA No. 110—March 14, 1980)*

New Rules Recommended by FMCS

The Federal Mediation and Conciliation Service has recommended new regulations governing its role of facilitating agreements in Federal sector labor relations. The proposed rules make explicit the Service's ability to set time limits on its participation.

If the parties have not reached a settlement by the expiration of the time limits, the Service may make recommendations. If the parties do not accept these recommendations, the FMCS may refer the case and recommendations to the Federal Service Impasses Panel. The Service will not refer a case to the Panel unil the mediation process is exhausted and the parties at impasse.

The parties must notify FMCS that negotiations have started or are about to start, except that for mid-term or impact bargaining they need not advise the Service.

The proposed rules appeared in the *Federal Register* of April 1, 1980. The deadline for comments is June 2.

Same Grade, Same Pay

In the first arbitration decision under the Civil Service Reform Act's provision for pay after downgrading, Arbitrator Clyde W. Summers upheld the employees' grievance against Letterkenny Army Depot, Pennsylvania. Local 1429 of the National Federation of Federal Employees represented the grievants.

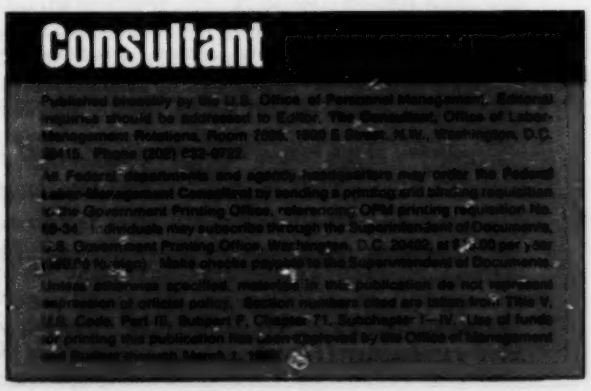
In 1974 the Depot downgraded various positions held by forty wage-grade workers. As a result of a successful appeal on a technicality, the employees were restored to their grade in January and February, 1977. They were again downgraded in April and May, 1977. The grievants again appealed, and this time their appeal was denied.

Then a new element came into play—the Civil Service Reform Act of 1978. Under the act, downgraded employees with one year of continuous service at a higher grade are entitled to retention of grade and pay for two years. The downgrading must occur before 1977.

The employees accordingly filed a grievance based on section 5362 of CSRA. The dispute centered on whether their downgrading occurred in 1974 or 1977.

Management argued that the *positions* were downgraded in 1974 and the *employees* in 1977. According to the Depot, the employees were not at a higher grade prior to their April-May, 1977 downgrading.

Arbitrator Summers ruled that the successful appeal of the first downgrading had the effect of nullifying the agency's action downgrading the positions in 1974. Thus the employees had continuous service in a higher grade. He awarded the grievants retroactive retention of pay and grade. *(Letterkenny Army Depot and NFFE Local 1429—February 26, 1980. LAIRS #12452)*



The Federal Labor-Management

Consultant

1 FLMC 80—10

May 23, 1980

United States Office of Personnel Management
Route to:

New Developments Checklist . . .

"Substantial evidence" clarified in MSPB decision . . . p. 1
Navy upheld in its refusal to negotiate on AFGE proposal for reduction-of-hours . . . p. 1
Management need not consult with ACT on meeting since attendance is voluntary . . . p. 1
Did NTEU violate contract by making end run outside Customs Service? . . . p. 2
Flow charts show procedures for handling ULPs . . . p. 3
FLRA appoints Robinson as Chief Counsel for Case Handling . . . p. 4
DLA's evaluation of union member was unfair . . . p. 4
Authority finds IRS not guilty in NTEU case . . . p. 4

OPM LIBRARY
JUN 13 1980
U.S. GOVT. PUBS. DEPOSITORY

MSPB Defines "Substantial Evidence"

In a recent decision the Merit System Protection Board for the first time defined "substantial evidence," a definition which has important implications for Federal labor-management relations. The Civil Service Reform Act, section 7701(c)(1)(A), requires management action concerning an employee's unacceptable performance under section 4303 to be based on "substantial evidence." Another part of the act, section 7121(e)(2), says that arbitrators are to be governed by section 7701(c)(1).

The Board gave this meaning to the term "substantial evidence":

> Unlike the preponderance of evidence standard, which required evidence that a reasonable person would accept as sufficient to find a contested fact more probably true than untrue, the substantial evidence standard requires only evidence of such quality and weight that reasonable and fair-minded persons in exercising impartial judgment might reach different conclusions.
>
> This standard precludes the Board's presiding official from substituting his or her own judgment for that of the agency. It obliges the presiding official to determine only whether, in light of all the relevant and credible evidence before the Board, a reasonable person could agree with the agency's decision (even though other reasonable persons, including the presiding official, might disagree with that conclusion).

The Board's definition appeared in a case concerning an employee of the Defense Logistics Agency who appealed management's denial of a within-grade step increase in salary. *(William E. Parker v. Defense Logistics Agency, MSPB Opinion and Order—February 19, 1980)*

Authority Rules for Navy in Negotiability Dispute

Upholding the Naval Exchange at Patuxent River, Maryland, the Federal Labor Relations Authority ruled nonnegotiable a proposal by Local 1603 of the American Federation of Government Employees. The Authority said the AFGE proposal would violate management's statutory right to remove employees. The proposal barred the agency from reducing hours of specified categories of employees unless it first separated all intermittent employees.

The first sentence of the proposal required the Exchange, if it decided to reduce any temporary part-time employee to less than 20 hours per week, to first separate all intermittent employees. The second sentence required the agency, if it decided to reduce any temporary full-time employees to less than 35 hours per week, to first reduce all temporary part-time employees to less than 20 hours per week or to separate them.

Continuing to build in a pyramid-like manner, each subsequent sentence required the Exchange to separate all intermittent employees as a mandatory condition prior to reducing the hours of other categories of employees below specified levels.

Because the proposal violates the Federal Service Labor-Management Relations Statute, section 7106(a)(2)(A), it is not within the agency's duty to bargain. *(3 FLRA No. 1—April 4, 1980)*

No Duty To Bargain on Sales Pitch

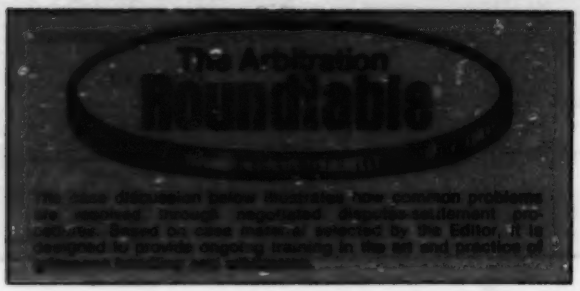
When the Pennsylvania National Guard allowed insurance company representatives to conduct meetings and sell policies to personnel, the Association of Civilian Technicians cried "unfair." The union filed charges under section 19(a)(1) and (6) of former Executive Order 11491. But when the case came before the Federal Labor Relations Authority, the Authority found no violation of employee or union rights. The meetings were voluntary, the Authority said, and discussions concerning insurance did not involve a working condition which required consultation or negotiation.

What irked ACT was that the insurance company was associated with the National Guard Association of the United States (NGAUS), a national organization which had testified against the unionization of national guard technicians and armed forces.

The Authority's administrative law judge observed

(Continued on page 4)

PM 1.13:



On the Ban Wagon

Casefacts: Management at the U.S. Customs Service's Chicago region was concerned about "end runs" made by the National Treasury Employees Union. The union had complained directly to the press, Congress and Federal agencies without first trying to resolve the problem with the employer.

To correct the situation, at contract negotiations management proposed a clause to restrict the union's filing of "charges or complaints" outside the Customs Service. After hard bargaining and some revision of the initial proposal, the parties signed off on the agreement.

In Article 3 of the contract they agreed to place primary reliance on informal and local settlement of differences through discussion. NTEU agreed that "prior to a complaint being filed against the Employer with anyone outside the Customs Service, the Employer will be informed of the complaint in writing and provided 20 days to respond prior to the complaint being filed, unless an emergency exists."

In June 1978, NTEU wrote the Civil Service Commission asking whether the Commission had approved the Service's affirmative action plan and whether the Service's EEO employees met qualifications.

A month later, in July, the union wrote CSC that although the employer's Chicago region may have certified the qualifications of principal EEO officials, NTEU believed "a thorough and complete audit would reveal a substantial lack of qualifications." The union requested an audit.

In an August letter, this one to the Service's Chicago regional commissioner, the union wrote of management's alleged efforts to harass a union officer. A copy of the leter was sent to the Civil Service Commission.

And lastly, in April 1979, NTEU filed unfair labor practice charges with the Federal Labor Relations Authority, alleging that the Customs Service had unilaterally eliminated certain overtime work.

Management decided that NTEU had violated the agreement, and it took its grievance to arbitration.

Testimony at the arbitration hearing centered on the negotiating history of Article 3.

According to management's chief negotiator, the employer's proposal was a response to instances where the union had gone outside with complaints about problems within the Service. NTEU had done this without initially attempting to resolve the problems within the Service.

A union spokesman testified that the employer's proposal was in response to NTEU complaints to Congressmen or the press. Management had told him that they did not want to be embarassed with complaints to outsiders before they had a chance to correct the problem internally.

During negotiations NTEU resisted management's initial proposal and insisted, among other things, that the word "charges" be deleted. NTEU finally agreed to a restriction on "complaints." The union argued that the article was "intended to apply to complaints against the Chicago region which were to be lodged with *members of Congress.*"

In NTEU's opinion, its June and July letters to the Commission were an exercise of its right of communication with individuals, agencies and the like, rather than complaints within the meaning of Article 3.

The August letter, said NTEU, was designed to alert the Commissioner to violations of law and hence was not a complaint.

Management contended that Article 3 made it improper for the union to file an unfair labor practice charge without first discussing it with the employer.

Not so, responded NTEU. The contract placed no restrictions on *charges*—just on *complaints.*

Issue: Did the union's actions violate Article 3?

Award: Arbitrator James R. Cox found that NTEU's actions in July and August violated the agreement. He directed the union to comply with the contract as interpreted by his award.

Cox saw nothing in the circumstances to indicate that NTEU's actions were taken on an emergency basis. Nor, he said, was there any evidence that the union had made any attempt to discuss these matters with management prior to going outside.

The arbitrator further observed that while management's proposal was occasioned by the union's complaints to Congress, he found no such limitation in the language of the contract.

As to the letters, Arbitrator Cox agreed with NTEU that the June letter was in the nature of an inquiry, not a complaint.

But the July letter, he ruled, indicated that EEO officials lack qualifications, and thus had the effect of raising a complaint.

Cox found that the third letter of August "must likewise be considered a complaint for it objects to alleged improper actions by the Customs Service," and a copy was sent the Commission.

The arbitrator noted that it was clear from bargaining history that charges filed before government agencies were not to be circumscribed by Article 3. Testimony indicated that at negotiating sessions the union had stressed it would not give up its right to file charges. Cox accordingly found that the April 1979 unfair labor practice charge was not a complaint as the term was used in the contract. *(Treasury, U.S. Customs Service and National Treasury Employees Union—December 28, 1979. LAIRS 12406)*

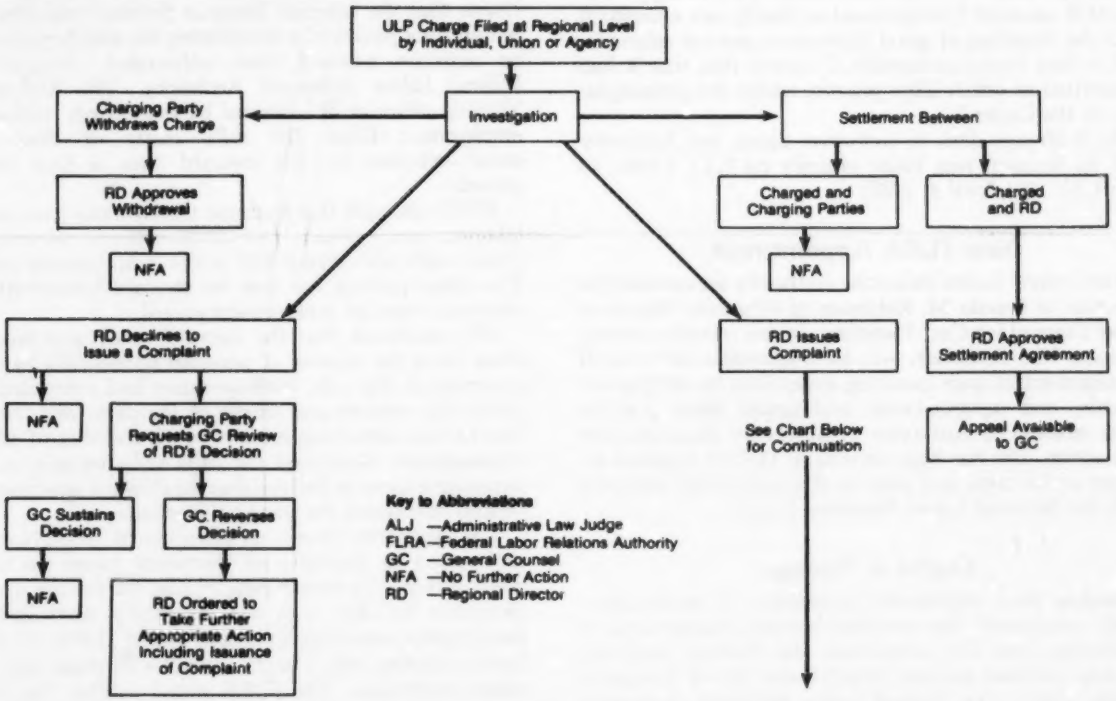
What Happens When You File an Unfair Labor Practice Charge

Like all bargaining laws, the Federal Service Labor-Management Relations Statute prohibits unfair labor practices by management and labor organizations (section 4116). Unfair labor practice charges may be filed by an individual, union or agency against an agency or union.

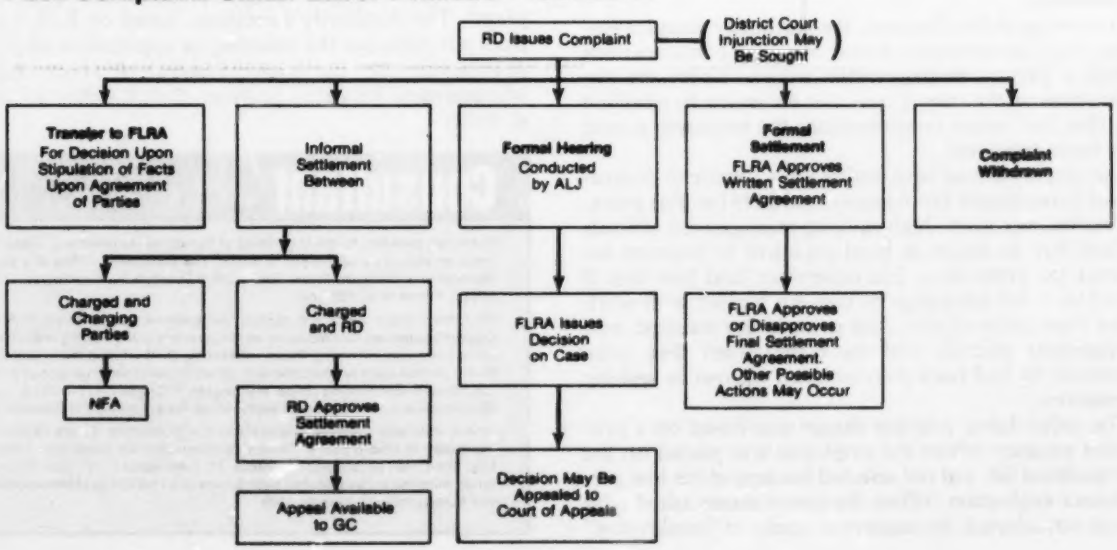
A charge filed with the Federal Labor Relations Authority is processed through the steps shown in the chart below, Pre-Complaint Unfair Labor Practice Procedures. The second chart, Post-Complaint Unfair Labor Practice Procedures, shows what happens when the regional director of the Authority issues a complaint.

The charts are taken from the Comptroller General's report to Congress on the first year's operation of the Federal Labor Relations Authority.

Pre-Complaint Unfair Labor Practice Procedures



Post-Complaint Unfair Labor Practice Procedures


RD Issues Complaint
District Court Injunction May Be Sought
Transfer to FLRA For Decision Upon Stipulation of Facts Upon Agreement of Parties
Informal Settlement Between
Formal Hearing Conducted by ALJ
Formal Settlement FLRA Approves Written Settlement Agreement
Complaint Withdrawn
Charged and Charging Parties
Charged and RD
FLRA Issues Decision on Case
FLRA Approves or Disapproves Final Settlement Agreement. Other Possible Actions May Occur
NFA
RD Approves Settlement Agreement
Decision May Be Appealed to Court of Appeals
Appeal Available to GC

(Continued from page 1)

that although those present at the meetings were subjected to a sales pitch, including a laudatory depiction of NGAUS, anyone who found it objectionable could walk out.

The ALJ added that there was no doubt that the Guard refused ACT's request for consultation on the briefings. A government agency, however, does not have to confer with the union every time an insurance company raises its rates.

The ALJ said, "Though Respondent's active support of NGAUS *vis-a-vis* Complainant is clearly not consonant with the fostering of good labor-management relations, and is thus found censurable, I cannot find that it had committed an unfair labor practice within the contemplation of the Order."

As it always does in carryover cases, the Authority said its decision was based entirely on E.O. 11491. *(3 FLRA No. 2—April 4, 1980)*

New FLRA Appointment

The Federal Labor Relations Authority announced the selection of **Brenda M. Robinson** of Wheaton, Illinois as Chief Counsel for Case Handling. In this recently created position Ms. Robinson will be responsible for overall management of case handling exceptions to arbitrators' awards, and representation and unfair labor practice cases referred to Authority members for final decision and action. She has been serving as FLRA's regional attorney in Chicago, and prior to that was a field attorney with the National Labor Relations Board.

Rights of Passage

Because the complainant's supervisor "at least subjectively considered" the employee's union background in evaluating him for promotion, the Defense Logistics Agency violated section 19(a)(1) and (2) of Executive Order 11491. The Federal Labor Relations Authority ordered the agency to rerun the promotion action, with a different supervisor rerating the employee and making the selection.

In arriving at this decision, the Authority found it sufficient that discrimination based on union considerations played a part in management's action. Given the circumstances of the case, it was not necessary to establish that "but for" union considerations the employee would have been promoted.

The employee had been active with American Federation of Government Employees Local 2449 for nine years. On various occasions high-ranking management officials advised him to resign as local president to improve his chances for promotion. His supervisor told him that it would be to his advantage to concern himself with work rather than union affairs. And in an earlier incident, two management officials told the complainant they were convinced he had been discriminated against in seeking promotions.

The unfair labor practice charge was based on a promotion vacancy where the employee was placed on the best qualified list, but not selected because of his low performance evaluation. When the complainant asked why he was not selected, his supervisor spoke of "weaknesses" in his performance but did not, or was unable to, furnish any specifics.

The Authority noted that the case was decided solely on the basis of the Executive Order and if the new Federal Service Labor-Management Relations Statute had not been enacted. *(2 FLRA No. 118—March 21, 1980)*

NTEU Charges Against IRS Dismissed

Allegations by the National Treasury Employees Union that the Internal Revenue Service committed an unfair labor practice by monitoring the telephone calls of an assistant steward were unfounded, declared the Federal Labor Relations Authority. The Richmond, Virginia office of IRS, alerted by complaints from other employees, tallied 220 calls—many of them personal—received by the steward over a four month period.

NTEU charged that because the steward won an arbitration case, management retaliated by monitoring his phone calls and giving him a low performance rating. The union pointed out that the steward had previously received a special achievement award.

IRS countered that the steward made and received three times the number of personal phone calls by other attorneys in the unit. His supervisor had counseled him about the number and length of the calls, and the fact that he was disturbing his own work and that of others. Management monitored his calls only because it had reasonable cause to believe that the steward was misusing official telephones for personal business.

The Authority found no showing of discriminatory motivation or disparity of treatment based on union membership. The monitoring, conducted for the reasons described by IRS, was not inherently destructive of basic rights assured by Executive Order 11491, nor did it have a chilling effect on the exercise of these rights by other employees. The FLRA noted further that there was no evidence of anti-union animus by the steward's supervisor.

The Authority accordingly dismissed the NTEU complaint. The Authority's decision, based on E.O. 11491, does not prejudge the meaning or application of related provisions in the new Federal Service Labor-Management Relations Statute. *(3 FLRA No. 3—April 4, 1978)*

Consultant

Published biweekly by the U.S. Office of Personnel Management. Editorial inquiries should be addressed to Editor, The Consultant, Office of Labor-Management Relations, Room 7535, 1900 E Street, N.W., Washington, D.C. 20415. Phone (202) 632-6752.

All Federal departments and agency headquarters may order the Federal Labor-Management Consultant by sending a printing and binding requisition to the Government Printing Office, referencing GPO printing requisition No. 30-5. Individuals may subscribe through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, at $19.00 per year ($23.80 foreign). Make checks payable to the Superintendent of Documents.

Unless otherwise specified, materials in this publication do not represent expressions of official policy. Section numbers cited are taken from Title V, U.S. Code, Part III, Subpart F, Chapter 71, Subchapter I—IV. Use of funds for printing this publication has been approved by the Office of Management and Budget through June 30, 1984.

The Federal Labor-Management

Consultant

1 FLMC 80—11

June 6, 1980

United States of America
Office of
Personnel Management
Route to:

NEWARK PUBLIC LIBRARY

JUN 20 1980

U. S. DEPT. OF LABOR
DEPOSITORY 376

PM 1.13:

New Developments Checklist . . .

Federal mediators can't bargain under Federal sector labor law . . . p. 1
Arbitrator Seidenberg's award upheld by Authority . . . p. 1
AFGE's proposal to Denver Mint ruled out of bounds . . . p. 1
Community Services retains right to select . . . p. 1
Navy—Machinists tangle on official time . . . p. 2
Delaware Guard—ACT to bargain on union demand . . . p. 3
NFFE proposal violates Air Force rights . . . p. 3
Panel unveils new strategy in Army—AFGE impasse . . . p. 3
Norfolk Naval Shipyard commits ULP against IFPTE . . . p. 3
Navy has no duty to bargain on NFFE proposal . . . p. 3
Federal Service Impasses Panel Tieline . . . p. 4
SSA found not guilty of unfair practice against AFGE . . . p. 4

Law Bars Bargaining by Mediators

The Authority dismissed a representation petition filed by field mediators in Region 7 of the Federal Mediation and Conciliation Service. In concurrence with its administrative law judge, the Authority held that because the mediators administer provisions of the Federal Service Labor-Management Relations Statute, they may not be included in a bargaining unit.

The law directs FMCS to assist agencies and unions in the resolution of negotiation impasses (section 7119(a). Another part of the law, section 7112(b)(4), states that a bargaining unit cannot be appropriate if it includes an employee engaged in administering provisions of the statute. *(3 FLRA No. 19—April 25, 1980)*

Authority Sustains Arbitration Award

A three year grievance neared its end last month when the Federal Labor Relations Authority denied a request by Transportation's Federal Railroad Administration for review of an arbitration award. Arbitrator Jacob Seidenberg had ruled the grievant entitled to a noncompetitive career promotion and awarded him a retroactive promotion with back pay.

The grievance started when a GS-13 management analyst, represented by American Federation of Government Employees Local 2814, asked that his position be upgraded to reflect additional duties and responsibilities. A desk audit showed he was performing duties at a GS-14 level.

The employer determined that the new GS-14 position resulted from planned management action, and must therefore be filled through competitive procedures. Another employee was selected for the job. The analyst grieved that he was improperly denied a noncompetitive career promotion since the new position resulted from an accretion of additional duties and responsibilities.

Following its customary practice, the former Federal Labor Relations Council (predecessor of the Authority) asked the Civil Service Commission for its interpretation of applicable law and regulations as they pertained to Seidenberg's award. When OPM, the successor agency to the Commission, found no violation of law or rules under the particular circumstances of this case, the Authority sustained the award. *(3 FLRA No. 21—May 8, 1980)*

FLRA Rules on U.S. Mint—AFGE Case

American Federation of Government Employees' bargaining proposals to the U.S. Mint in Denver were ruled nonnegotiable by the Federal Labor Relations Authority. At the same time FLRA denied the activity's request to make an additional submission, following the union's response to management's statement of position.

The union had demanded weekly rotation of assignments in two work groups. A second proposal by AFGE Local 695 concerned assignment to details, with management to choose volunteers on the basis of seniority. Both proposals, said the FLRA, interfere with management's right to assign employees under section 7106(a)(2)(A) of Federal sector labor law.

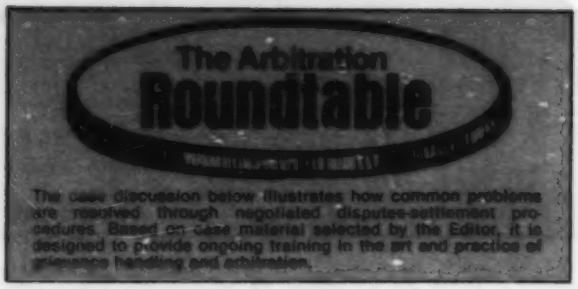
The Authority's procedural ruling on additional submissions explained that neither the act nor its own regulations provide for submissions beyond the union's petition, the agency's statement, and the union's response. Further, an agency has 30 days to set forth its position in full.

The Authority's policy is not to consider submissions on negotiability cases other than those prescribed in law or regulations unless FLRA requests additional information or grants permission to file a submission. The Authority's ruling will apply to all subsequent negotiability cases. *(3 FLRA No. 7—April 14, 1980)*

CSA's Right to Select Is Upheld

The union's proposal is not within Community Services Administration's duty to bargain, declared the Federal Labor Relations Authority, and it also violates Federal sector labor law. The Authority accordingly told the National Council of CSA Locals, American Federation of Government Employees, to drop its demand for filling vacancies with in-house employees. AFGE's proposal would have required the employer to select one of five qualified CSA applicants from within the area of consideration.

(Continued on page 4)


The Arbitration
Roundtable
The case discussion below illustrates how common problems are resolved through negotiated disputes-settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

It's Been a Long, Long Time

Casefacts: Lodge 192 of the International Association of Machinists represents 200 blue collar workers at Navy's Public Works Center in Pensacola, Florida. For ten years the union shop committee had been meeting once a month for an hour, on Navy time. Usually only shop committee members attended, although management could come if it wanted to. Sometimes individual members of management were invited when particular subjects were discussed.

The main attraction at each meeting was an outside speaker on subjects like compensation, promotion to management, labor history and job classification. Generally the talks were by people from other departments.

There was also a report of union news throughout the Center. The committee frequently discussed potential grievances and trouble spots. According to the union, this often resulted in a compromise with management rather than proceding with a grievance.

In 1979 a new agreement went into effect. Article 3 called for the employer to give the union advance notice and an opportunity to negotiate before management issued new personnel policies or changed old policies and practices. Article 7 listed specific conditions where the employer must provide official duty time to union representatives.

Two months later management ordered the lodge to discontinue the meetings because they were using official time. IAM grieved, charging management with violation of Article 3.

The activity made the point that the new agreement, unlike the old one, explicitly spelled out conditions allowing official time and listed the total of such conditions. The intent was to list all allowable conditions, permit no others, and discontinue these past practices. "If management had agreed that a unilateral meeting of union representatives warrented the use of official duty time, the employer most certainly would have incorporated the provision in the agreement," Navy said.

Management argued also that these meetings were brought up during negotiations and then dropped when management rejected the use of official time.

The union contended that it never agreed that no official time would be allowed except that specified in the agreement, or that all other past practices were to be discontinued.

Issue: Did management violate the contract by cancelling the monthly shop steward meetings?

Award: Arbitrator Taylor D. MacLafferty found for the union, ruling that the unilateral shop committee meetings should continue on official time.

MacLafferty found nothing to substantiate Navy's claim that continuance of these specific meetings was discussed at the bargaining table and objected to by the employer, and that the union accepted this rejection.

The activity may have had these meetings in mind when it proposed that the agreement terminate all written and unwritten agreements and understandings, the arbitrator said. The union may have been thinking of these meetings when it rejected this proposal. "Unfortunately, this arbitrator is not omniscient. He doesn't know what either party was thinking."

Arbitrator MacLafferty explained his decision. "Before the days of formal, written labor-management agreements, the relationships between employer and employee were established by tradition and practice. Job descriptions, assignments, promotions, management rights, and other issues now accepted as legitimate and proper subjects for inclusion in written agreements were all determined by history—by what had always been done in the past.

"It is very important to understand that even today an agreement in its basic form is simply a recording of a considerable number of individual negotiated agreements. It is not now, and it never was, an attempt to record all the nuances of all the rights, practices and responsibilities that have developed over the years between employer and employee. There are so very many of these that to record them all would be impossible.

"The agreement records only those disputes that have been negotiated and agreed upon. It does not attempt to record those traditional practices of long standing that neither the union nor the employer has ever wanted to change.

"Such is the case with the monthly union shop committee meetings. They have been going on for ten years. The union has liked them. The employer apparently has also liked them, at least well enough to have been willing to allow time for them over all these years. There is no evidence that there has ever been a dispute about them. There does not seem ever to have been any mention of them in any formal agreement.

"When practices such as this continue over many years they become very, very difficult to change. It is the opinion of the arbitrator that if the employer's desire to change this traditional practice had been discussed and negotiated, and if the union had agreed to its discontinuance, there would be direct, specific mention of it in the new agreement.

"Since there is no direct mention of it, then the arbitrator must conclude that...there was no agreement to discontinue the meetings. The meetings, therefore, remain 'cast in concrete' by virtue of their ten-year tradition and history." *(Navy, Public Works Center, Pensacola, Florida and IAM Lodge 192—December 3, 1979. LAIRS #12272)*

Guard, ACT Dispute on Filling Vacancies

The Federal Labor Relations Authority gave the go-ahead for bargaining on the Association of Civilian Technicians's promotion proposal to the Delaware National Guard. ACT wanted positions filled from three areas of consideration: first, all civilian technicians; second, all Guard members; and third, all others.

The National Guard argued that because the proposal establishes a mandatory rank order preference, it constrains management's authority to recruit and select employees.

In the Authority's view, the proposal does not prevent management from expanding the area of consideration, or require that an employee be selected from any of the defined areas on consideration. The proposal merely provides a procedure for defining the initial area of consideration, said FLRA, and thus is not in conflict with section 7106(a)(2)(C) of the Federal Service Labor-Management Relations Statute. *(3 FLRA No. 9—April 14, 1980)*

Authority Denies NFFE Proposal

The union proposal gave management two alternatives for handling employees who, because of illness or injury, were temporarily unable to perform the full range of their regular duties. Management at the Air Force Contract Management Division, Hagerstown, Maryland could either detail the employees to suitable duties, or it could tailor their regularly assigned duties to their physical limitations. The Federal Labor Relations Authority, however, told Local 1624 of the National Federation of Federal Employees that this proposal was not negotiable.

The Authority ruled that the proposal would violate management's right to assign employees and to assign work under section 7106(a)(2) of Federal sector bargaining law. *(3 FLRA No. 20—May 8, 1980)*

Panel Uses New Strategy

Using a new strategy, the Federal Service Impasses Panel ordered the parties in a dispute over ground rules to settle without first waiting for them to consider its recommendations. The Panel decision directed the Third Army Corps and Fort Hood, Texas and Local 1920 of the American Federation of Government Employees to each select a negotiating team of no more than five members.

The union wanted an eight-member committee consisting of the AFGE national representative, the local union president and vice-president, and one member from each of the five major work areas.

The Army countered with a proposal for a five-member negotiating team. It suggested that two union negotiators be selected from U.S. Army Garrison activities and the remainder from non-Garrison tenant activities, with the union appointing its national representative in lieu of a bargaining unit member.

The Panel accepted the employer's proposal of a five-member team, but left the union free to designate whomever it wanted for the AFGE team.

The Panel's decision resulted from its initial determination to resolve the dispute on the basis of written submissions, followed by whatever action it deemed appropriate. The new strategy is part of FSIP's game plan to shorten the time in which impasses are resolved and to create doubt in the parties' minds as to Panel action, thereby encouraging voluntary settlements. *(III Army Corps and Fort Hood, Texas and AFGE Local 1920—Case No. 79 FSIP 50(a), March 31, 1980, Release No. 145)*

On the Filing Line

Management at Norfolk Naval Shipyard erred by not providing the union an opportunity to bargain over the impact of a change in past practice, the FLRA ruled. Local 1 of the International Federation of Professional and Technical Engineers filed unfair labor practice charges when the Shipyard altered procedures for employee access to work files.

Although the union argued that management should have bargained over the change itself as well as the impact of the change, the Authority dismissed this part of IFPTE's allegation. Because the change in procedures related to the activity's method of operation, the Authority said, it was a decision reserved to management by Executive Order 11491 and thus not negotiable.

The Authority determined, however, that the Shipyard's failure to bargain on the impact of the change violated section 19(a)(1) and (6) of the Order. FLRA also held that the change in access to work files for the purpose of responding to claims of poor employee performance was a violation of section 19(a)(1) and (6).

The Authority's decision in this carryover case was based on the Order rather than the new labor relations law for Federal employees. *(3 FLRA No. 15—April 28, 1980)*

NFFE Can't Bargain on Navy Reps

The National Federation of Federal Employees' proposal that each party have a minimum of three representatives at the bargaining table was turned down by management. The Naval Training Center in Orlando, Florida called NFFE's suggestion nonnegotiable, and the Federal Labor Relations Authority upheld the activity.

Noting Local 1451's proposal concerned matters *beyond* those directly affecting bargaining unit employees, the Authority ruled that Navy had no duty to bargain. A union cannot require management to designate a particular number of representatives—nor, for different reasons, would a management proposal requiring a particular number of union representatives be negotiable, the Authority added.

Federal labor law calls for bargaining on conditions of employment affecting unit employees under section 7103(a)(12). *(3 FLRA No. 14—April 28, 1980)*

The Federal Service Impasses TIE LIN

The Federal Service Impasses Panel has taken a number of diverse actions in response to requests for assistance to settle bargaining impasses.

Although the Panel directed that a factfinding hearing be held, the parties reached a voluntary settlement at the prehearing conference on the issues of official time for union representatives and career ladder promotion—HEW, Chicago, Illinois and American Federation of Government Employees Local 3400 *(Case No. 79 FSIP 118, March 19, 1980).*

Because threshold issues concerned the employer's duty to bargain, the Panel declined to assert jurisdiction in two cases:

•Management alleged that the union's proposal to grant official time for preparation for bargaining is nonnegotiable—Interior, Bureau of Land Management, Richfield, Utah and AFGE Local 3790 *(Case No. 79 FSIP 87, March 3, 1980).*

• The issue concerning changes in procedure for issuing safety glasses arose from differing interpretations of the agreement—Naval Weapons Station, Concord, California and AFGE Local 1931 *(Case No. 80 FSIP 4, March 19, 1980)*

The Panel granted withdrawal requests or declined to assert jurisdiction where initial requests for FSIP assistance were prematurely filed or the parties agreed to resume negotiations to settle their disputes:

•Navy, Aviation Supply Office, Philadelphia, Pennsylvania and AFGE Local 1698 *(Case No. 79 FSIP 116, March 12, 1980).*

•General Services Administration, Washington, D.C. and AFGE Local 2151 *(Case No. 79 FSIP 109, March 31, 1980).*

•Texas Air National Guard, Austin, Texas and Texas Air National Guard Council of AFGE Locals *(Case No. 80 FSIP 1, March 31, 1980).*

In the press release of April 15 which cited the above cases, FSIP announced that it was issuing a subject matter index and table of cases covering Panel Releases No. 111 through 132, January - December, 1979.

(Continued from page 1)

With respect to filling positions, an agency has the right to make selections from certified candidates or any other appropriate source (section 7106(a)(2)(C) of the Federal Service Labor-Management Relations Statute). CSA argued that the proposed clause would prevent it from filling a position unless it selected from an in-house certificate. The activity further contended that the proposal would restrict management's discretion to consider other candidates.

The Authority sustained CSA's allegation. *(3 FLRA No. 13—April 28, 1980)*

Two Little Words

Two little words—"organization location"—triggered a dispute between the Social Security Administration and the American Federation of Government Employees that began in 1978 and wended its way slowly through unfair labor practice procedures. The case ended in 1980 when the Federal Labor Relations Authority dismissed the union's complaint, stating that matters involving the interpretation and application of an agreement are best resolved through grievance machinery.

Parties to the dispute were AFGE Locals 1802, 3600 and 2540, and field operations offices of SSA's Region VIII in Denver, Greeley and Pueblo, Colorado. The locals accused SSA of unilaterally changing working conditions and terms of their contracts by ignoring the two words, "organization location," in the sections on merit promotion. According to AFGE, management's announcements should do more than just list the state where a job vacancy was to be filled; they should also list specific district office locations.

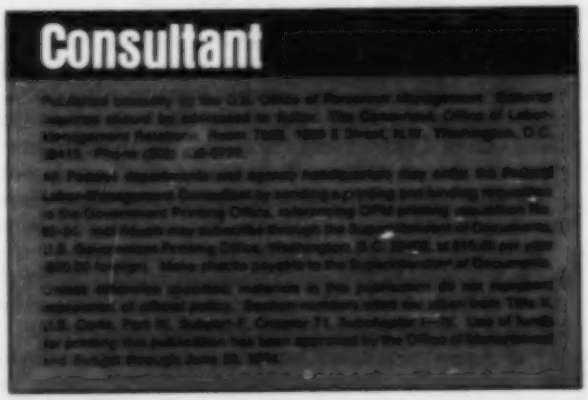
The record did not establish any past practice whereby notices of vacancies uniformly included the precise geographic location of each position, the Authority said. Consequently SSA had not unilaterally changed an existing working condition.

The Authority stated further that Executive Order 11491 clearly distinguished between alleged violations of a negotiated agreement which constitute fundamental, clear and unilateral breaches of an agreement and alleged violations which concern differing and arguable interpretations of an agreement. In cases of differing interpretations of the agreement, the aggrieved party's remedy lies within the grievance procedure rather than the unfair labor practice procedure.

The locals apparently felt that because the vacancy notice in question was issued at the regional level, a level above that covered by their contracts, the grievance procedure could not deal with this breach of the agreements. The Authority, however, accepted its administrative law judge's finding that "absent clear evidence to the contrary, it must be presumed that the grievance and arbitration procedures can adequately resolve all disputes on interpretation and application of the contract."

The Authority's decision was made on the basis of the Executive Order and as if the new Federal Service Labor-Management Relations Statute were not enacted. *(3 FLRA No. 10—April 14, 1980)*

Consultant



Consultant

June 20, 1980

New Developments Checklist...

Court nixes NTEU right to management's history of negotiations, contract interpretation under FOIA...p. 1

Authority dismisses NAGE appeal as moot...p. 1

Panel orders NASA—IFPTE to accept recommendations...p. 1

Fort Leonard Wood and NAGE go to arbitration on who should attend third step grievance meeting...p. 2

NFFE appeals employer's disapproval of contract...p. 3

Portsmouth Naval Shipyard found guilty of ULP...p. 3

Panel resolves deadlock between Army and AFGE...p. 3

GSA supervisor illegally questioned police officers...p. 4

DARCOM has no duty to bargain on union demand...p. 4

Authority upholds Scott AFB in refusal to bargain...p. 4

Court Rules Union Has No FOIA Right To IRS History, Rationale of Pact

A district court judge ruled that unions have no right under the Freedom of Information Act to a Federal employer's history of negotiations, nor to material giving management's interpretation of contract clauses. Judge Charles R. Richey of the U.S. District Court for the District of Columbia Circuit dismissed a suit brought by the National Treasury Employees Union against the Internal Revenue Service.

NTEU wanted access to the IRS Multi-District Collective Bargaining Contract Administration Handbook. The handbook has five parts: the contract itself; agency regulations applicable to the agreement; decisions by courts, arbitrators and administrative agencies pertaining to the contract; bargaining history of each article; and management's article-by-article interpretation of the contract. IRS agreed to give the union the first three sections but balked at turning over the last two.

The suit stemmed from the union's request under FOIA section 552(a)(2)(C) requiring agencies to make available to the public "administrative staff manuals and instructions to staff that affect a member of the public." NTEU contended that it is part of "the public."

The court held that "the public at large" is to be distinguished from "those who work for the Federal government." A Federal labor agreement affects only Federal employees and officials, and does not directly affect the public within the meaning of the statute. Judge Richey said "such housekeeping details simply do not affect the public within the meaning of section 522(a)(2)(C)." He noted that prior decisions deny access to mere housekeeping details.

The judge sustained the IRS argument that management's interpretation of the contract falls within the act's exemption for internal personnel practices. Section 552(b)(2) exempts from disclosure matters that are "related solely to the internal personnel rules and practices of an agency." The judge found that "Defendant's analysis of its obligations to its own employees is certainly material relating *solely to internal personnel obligations.*"

As to the employer's history of negotiations, it is so closely related to personnel rules contained in the contract that it also falls within the exemption, Judge Richey concluded. *(National Treasury Employees Union v. Department of Treasury, Internal Revenue Service: USDC, Civil Action No. 79-1417, April 24, 1980)*

A Moot Question

The Authority dismissed a union's negotiability appeal because the disputed position review had been completed and a legal judgment would have no practical effect on the controversy. Local R1-144 of the National Association of Government Employees filed an appeal when the Naval Underwater Systems Center, Newport, Rhode Island refused to bargain on the procedure for selecting grade 13-15 positions for review.

The agency contended that the position review was already carried out and NAGE's appeal was therefore rendered moot. The union did not respond to Navy's statement to the Authority.

Under the circumstances, the Authority concluded the negotiability issue was now moot. *(3 FLRA No. 24—May 8, 1980)*

Panel Issues Order to NASA and IFPTE

When its factfinder's report failed to break a bargaining deadlock, the Federal Service Impasses Panel ordered the parties to accept the recommendations. The National Aeronautics and Space Administration, Cleveland, Ohio and Local 28 of the International Federation of Professional and Technical Engineers were at impasse over hours of work and duration of the labor agreement.

Bargaining for the 540-member unit began in August 1978, and the parties met on 28 occasions. Earlier assistance by the Federal Mediation and Conciliation Service helped to resolve some issues.

IFPTE had offered a flexitime plan allowing employees to vary their start time and lunch period on a daily basis. NASA's proposal required workers to give one week's advance notice of their starting time, and limited their lunch period to 30 minutes. The Panel called for a one-year flexitime experiment to allow

(Continued on page 4)

The case discussion below illustrates how common problems are resolved through negotiated dispute-settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

The More the Merrier

Casefacts: The grievance of a food service worker at Fort Leonard Wood Army Hospital, Missouri was being handled by Local R14-32 of the National Association of Government Employees. It had progressed through the first two steps. The commanding officer of the health service command tenant activity, a colonel, called a step 3 grievance meeting in the base commander's conference room.

When the grievant, shop steward and local union president arrived, they found themselves confronting about ten management officials—three colonels, two or three majors, and other civilian officials.

Faced with this impressive array, the union president objected that the large number of management officials violated the contract. Only two managers had a right to be there, the president said, the commanding officer of the health service command tenant activity and the director of food services, a major.

The commanding officer responded that he intended to have his whole staff present. The local president then showed him the contract language for step three of the grievance procedure:

> Article 26, Section 3c(1), Step 3. The Commanding General or his designated representative shall meet... with the following persons in an attempt to reach a satisfactory resolution of the grievance or dispute: the aggrieved employee, the shop steward and/or representative (if representation is used) and the concerned director.

The commanding officer answered that it was not his agreement, nor was he the commanding general's designated representative. The president then showed the commanding officer the officer's own signature on the last page.

The grievant and union representatives refused to meet under the circumstances and left.

Within a week the commanding officer issued a decision adverse to the grievant. His letter noted that the grievant, chief steward and union president refused to discuss the grievance at the meeting "since members of my staff were present. Therefore, since you declined to meet and discuss the grievance, my decision is based on the information available to me."

NAGE filed a grievance. At the arbitration hearing the president and chief steward testified that because of the large management group at the step 3 meeting, they were intimidated and overwhelmed. They felt they were being "shanghaied" and could "not get fair treatment." The grievant's reaction was that of being "outnumbered by all these people who were out to get me."

The union drew a dramatic picture of the three employees, not professionals or lawyers, who were attempting to do the best they could to present the grievant's side against an unexpected group of skilled, professional management officials and tacticians.

NAGE pointed out that the meeting was called in the most impressive and authoritative room on the base, the commander's conference room. A clear line of private sector labor decisions, said NAGE, holds that being called into the chambers of high management has a chilling effect on employees. In this case, not only would the imposing room inhibit the three employees from making the most effective presentation, but the room was packed with authoritative officials.

The employer argued that the contract's wording was not an exclusive list of who could be present. Rather it was a list of the minimum number of persons who must be present for a step 3 meeting. Nowhere in the clause was there any limiting language.

Although management testified that past practice was for more than the five listed to be present, the record was not clear as to whether there had been additional persons present by common consent or prearrangement.

Issue: Did management violate the agreement by insisting that other management officials and/or representatives participating in a third step grievance, ordering that henceforth step three meetings should include only those specified in Article 26.

Award: Arbitrator Robert L.D. Davidson sustained the union grievance, ordering that henceforth step three meetings should include only those specified in the contract.

The arbitrator reasoned that if there is no qualification of a contract's wording either by previous practice or prior agreement, the stipulation in the contract prevails. And since testimony was in conflict as to past practice, he must rely on the actual words of the agreement.

Arbitrator Davidson was unable to find in the contract any action prescribed if step 3 were cancelled or not held as scheduled. He accordingly ruled that "because step 3 was not conducted according to the agreement, the original matter, if the grievant so desires, may be brought to arbitration."

He commented that the commanding officer's "rather cavalier dismissal of the meaning of the contract when shown the provisions for those attending, in view of his having signed the agreement, was not acceptable behavior. When dealing with military personnel in conflict with civilian personnel, the procedures must be according to civil law and not through or by the military authority of rank, under Civil Service Reform Act, 5 USC section 7121." *(Commander, Army Medical Department Activity, Fort Leonard Wood, Missouri and NAGE Local R14-32—March 13, 1980)*

NFFE's Appeal Dismissed

An agreement which has not been approved or disapproved by the agency head within 30 days after its execution goes into effect on the 31st day, subject only to applicable law, rule or regulation. This was the Federal Labor Relations Authority's interpretation of section 7114(c) of Federal sector labor law.

The Authority accordingly dismissed an appeal by the National Federation of Federal Employees for review of an employer's disapproval 79 days after the contract was executed. Given the circumstances, the Authority pointed out, the contract was already binding on the parties by the time HEW's Indian Health Service in Phoenix, Arizona disapproved it and the union appealed. The Authority ruled that NFFE's petition met neither conditions for appeal under section 7117 of the Federal Service Labor Management Relations Statute nor the Authority's own regulations.

The FLRA noted that its dismissal of the appeal did not mean the contract provisions contrary to the statute or other applicable law or rule were thereby enforceable. Any questions on the contract's validity should now be raised under grievance procedures. A provision found to be illegal would then be void and unenforceable. *(3 FLRA No. 25—May 8, 1980)*

And That's the Way It Is

Remarks by a manager at Portsmouth Naval Shipyard trying to dissuade a data processor from pursuing her grievance to arbitration were an unfair labor practice violating section 19(a)(1) of Executive Order 11491. This ruling by the Federal Labor Relations Authority found for the complainant, the International Federation of Professional and Technical Engineers.

A data processing group at the shipyard worked only the morning and afternoon shifts until 1977, when management assigned a single processor to the midnight shift on a rotational basis. The data processor was appointed temporarily to the graveyard shift, but she told her supervisor that emotionally and physically she could not handle the late shift and would have to resign.

The processor and her fellow employees filed grievances on their rotation to the midnight shift. Then the processor was transferred to another work group, thus removing the possibility of assignment to the late shift. She dropped her grievance, although those of the other employees continued.

At a meeting of the union, grieving employees and management, a management official pointed out that should an arbitrator find merit in the grievance, the employer might be forced to discontinue its policy of assignment on a rotational basis and instead assign a single data processor permanently to the midnight shift.

Soon afterward the data processor transferred back to her old job and was again subject to the rotational assignment. She asked IFPTE to reinstate her grievance.

The manager called her to say he had just learned that she had refiled her grievance. He explained the shipyard could settle the grievance by abandoning the rotational system and assigning one person on a permanent basis. Because she was the junior employee, she would most likely get the assignment. The conversation ended when she declined the opportunity to think the matter over, making it clear she would not withdraw her grievance.

According to the manager, he merely wanted to make sure the processor knew what was discussed at the joint meeting, since she had not been present.

The Authority concluded that the manager, irrespective of any altruistic intentions he may have had, interfered with the employee's right to file a grievance without fear of reprisal. His "gratuitous remarks constituted an implied threat" that if she pursued the grievance she would be assigned to the midnight shift. The Authority added that this was particularly true since the processor had put management on notice that she would resign rather than work the midnight shift.

In its customary disclaimer in carryover cases, the Authority said its decision was based entirely on the Executive Order, and as if the new labor law for Federal employees had not been enacted. *(3 FLRA No. 27—May 12, 1980)*

Army, AFGE Accept Panel Recomendations

A recommendation by the Federal Service Impasses Panel resolved a bargaining impasse between the Crane, Indiana Army Ammunition Center and Local 1415 of the American Federation of Government Employees. The parties were deadlocked on how much official time should be authorized for the union president to represent bargaining unit employees.

The employer offered two and one-half hours per workday or a total of ten hours on the basis of a four-day week. Management argued, among other things, that ten hours was reasonable and equaled the amount authorized under the old agreement even though there were fewer employees in the unit.

The union proposed that 20 hours be authorized, citing an increase in the number of formal grievances as well as the president's additional responsibilities in the health insurance area.

The Panel, after considering written submissions by the parties, recommended that Army's offer be amended to authorize four hours of official time per work day or sixteen hours per week. The parties later negotiated a settlement based on the recommendation. *(Crane Army Ammunition Center, Indiana and AFGE Local 1415—Case No. 79 FSIP 64, January 7, 1980, Release No. 142)*

(Continued from page 1)

employees a daily option of starting work between 7:00 a.m and 9:00 a.m.

Regarding the impasse over duration of the contract, the employer wanted a three-year term and the union a one-year term. The Panel's solution was a three-year duration with a limited one-year reopener for renegotiating flexitime.

The Panel's recommendations were accepted by the union, but NASA rejected those on flexitime. After review the Panel concluded that the impasse should be resolved on the basis of its prior recommendations and issued a Decision and Order to that effect. *(NASA, Lewis Research Center, Cleveland, Ohio and IFPTE Local 28, Lewis Engineers and Scientists Association—Case No. 79 FSIP 29(a), March 28, 1980, Release No. 144)*

GSA's Actions Are Unfair Labor Practice

General Service Administration's Region 9 should not have interrogated employees concerning statements allegedly made by a supervisor at a union meeting, the Federal Labor Relations Authority ruled. Nor should GSA have written the president of International Federation of Federal Police Local 41 that "union activities will not normally be considered an acceptable reason for granting LWOP." Both these actions, the Authority determined, violate employee rights under section 19(a)(1) of former Executive Order 11491.

In the first incident a supervisor attending a Local 41 meeting as a member reportedly said that while officers trained at the Police Academy may think they will be acting as policeman, "you don't listen to that; you don't pay attention to that; you do as I tell you." Since the role of Federal protective officers is changing from that of guard to police officer, the activity viewed these statements by a supervisor as a serious departure from management policy.

GSA accordingly asked several protective officers whether they were present at the meeting and heard the sergeant make the remarks. Each officer interviewed was told that management was investigating the supervisor's statement and that was all. Management was not interested in anything else that went on at the union meeting, the employer said.

The Authority found that GSA's interrogation of employees about their participation in protected activities was an unfair labor practice. While not belittling the gravity of the supervisor's alleged statements, the Authority said, only the most serious of circumstances could justify the interrogation. And in its view, the alleged statements were not that serious. Further, GSA could have taken some other action instead of questioning employees.

In the second incident, the union president had made excessive use of LWOP and the activity was attempting to control it. The Authority said that while management has wide discretion in administering LWOP to insure efficient operations, it cannot single out union activity as an unacceptable reason for granting this leave.

FLRA noted that the case was decided solely on the basis of the Executive Order and as if the new Federal Service Labor-Management Relations Statute had not been enacted. *(3 FLRA No. 22—May 8, 1980*

DARCOM Upheld in Negotiability Issue

Two proposals by the National Federation of Federal Employees Local 1332 do not fall within the employer's duty to bargain, the Federal Labor Relations Authority determined. The proposals contain qualifications of employees to be assigned as alcohol and drug abuse counselors at the U.S. Army Materiel Development and Readiness Command (DARCOM).

The Authority accepted DARCOM's defense that the proposals come under section 7106(b)(1) of Federal sector labor law. This section states that types and grades of employees assigned to an organizational subdivision or work project are negotiable solely at the election of the agency. "In this case," observed the Authority, "the agency has elected not to negotiate." *(3 FLRA No. 28—May 12, 1980)*

NAGE Proposal Hampers AFB Rights

Sustaining management at Scott Air Force Base, Illinois, the Federal Labor Relations Authority ruled that the union proposal violated the agency's right to assign employees. The National Association of Government Employees Local R7-23 wanted clerical employees downgraded under the Federal Evaluation Factor System to be given mandatory placement rights based on seniority.

Citing an earlier decision, *2 FLRA No. 77*, the Authority concluded that proposals compelling assignment of a particular employee solely on the basis of seniority were a direct interference with management's rights under section 7106(a)(2)(A) of the Federal Service Labor Management Relations Statute. *(3 FLRA No. 26—May 8, 1980)*

80-13

The Federal Labor-Management

Consultant

1 FLRC 80-13 July 4, 1980

United States Office of Personnel Management Library Route to:

JUL 21 1980

GOVT. PUBS. DEPOSITORY 379

New Development Checklist...

Air Force must bargain on union demand for official time for union team in preparations for negotiation...p.1
Frazier confirmed to five-year term as FLRA member...p.1
Court tells NTEU that judicial consideration of lawsuit is barred since union did not pursue case to arbitration...p.1
Arbitrator rules on grievance concerning employee's no-show on holiday...p.2
GSA told to negotiate on AFGE flexitime proposal...p.3
Panel issues first decision and order on pay award...p.3
Authority denies request for policy statement on mid-term bargaining...p.3
Bookshelf...p.3
Federal Service Impasses Panel Tieline...p.4
EEO counselors not in bargaining unit at Kelly AFB...p.4

Major Negotiability Decision on Official Time for Unions

The Air Force will be bargaining on the union's demand to grant the same amount of official time to the union bargaining team for preparation for contract negotiations as that allotted the management team. The Federal Labor Relations Authority ruled that the union proposal is negotiable under the Federal Service Labor-Management Relations Statute. The proposal was made by American Federation of Government Employees Local 1692 to the 323rd Flying Training Wing, Mather AFB, California.

Section 7131(a) of the statute authorizes offical time for "any employee representing an exclusive representative in the negotiation of a collective bargaining agreement." Section 7131(b) requires that a union's internal business be performed in a nonduty status.

The Air Force contended that union preparation for negotiations should be considered internal business under section 7131(b).

The Authority disagreed. In its deliberations the Authority cited legislative history of the law and a previous decision, *2 FLRA No. 1—October 9, 1979.*

The disputed AFGE proposal "clearly does *not* relate solely to the structure and institution of the labor organization," the Authority said. "Rather, the proposal specifically involves the allotment of official time to union negotiators for the purpose of preparing for contract negotiations with management."

The Authority concluded that Congress intended that preparations for negotiations, as well as actual negotiations, "are not internal business of a union within the meaning of section 7131(b)." Accordingly, preparations fall within the employer's duty to bargain under section 7131(d).

Warning that it had not ruled on what activities properly constitute preparations, the Authority noted that such questions are more appropriately resolved by the parties during negotiations or by arbitrators. It emphasized that its decision should not be construed as allowing union officials to use preparation time for matters involving internal union business. *(3 FLRA No. 47—May 30, 1980)*

In a later case concerning the identical issue of preparation time, the Authority again ruled the union proposal to be negotiable. The Authority's decision was based on the same rationale it used in the *Mather* case described above. Parties in this second case were the Federal Uniformed Firefighters Local F-169 and Army Armament Research and Development Command, Dover, New Jersey. *(3 FLRA No. 49—May 30, 1980).*

Senate Confirms Frazier to FLRA

Henry B. Frazier III has been confirmed by the Senate to a five-year term on the Federal Labor Relations Authority. His term will run to July 1, 1985. Mr. Frazier has served as a member of the Authority since its establishment on January 11, 1979. Prior to his appointment to the Authority, he was executive director of the Federal Labor Relations Council, the predecessor agency to the FLRA.

Court Rules Exhaustion Doctrine Bars Consideration of NTEU Case

Failure of the National Treasury Employees Union to pursue a grievance to arbitration bars judicial consideration of the case, the U.S. Court of Appeals for the District of Columbia ruled. The court held that NTEU had not exhausted its contractual remedies before bringing suit against the Internal Revenue Service.

The case began when a revenue agent received a written reprimand for failing to report a bribery attempt. The agent and NTEU filed simultaneously a grievance and a lawsuit.

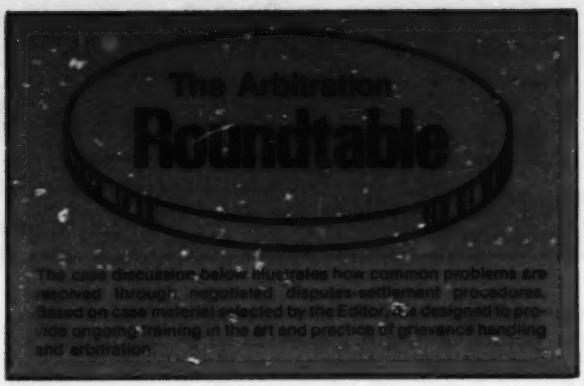
The grievance sought removal of the reprimand from the agent's personnel file because his initial IRS interrogator taped their conversation without giving a Miranda-like warning or assurances allegedly required by the IRS manual. The grievance also charged management with violation of the contract.

The grievance began and ended at Step 3 when IRS denied the grievance. It was not taken to step 4 or arbitration.

The lawsuit alleged violation of the manual. It sought destruction of the tape, prohibition of the use of this information in proceedings against the agent, and a declaratory order for IRS to obey its own regulations.

(Continued on page 4)

PM 1.13:


The Arbitration
Roundtable
The case discussion below illustrates how common problems are resolved through negotiated disputes-settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

Being There

Casefacts: On May 4, 1979 a supervisor of electronics technicians at the state airport in Rhode Island posted the watch schedule for May 20 to June 16. The schedule did not indicate that May 28 was Memorial Day.

On May 9 a technician, who was also steward for the Federal Aviation Science and Technological Association, read the watch schedule. He then wrote on the schedule that a list of employees scheduled to work Memorial Day was not posted as of that day, adding "Refer Article 20, Section 4 of FASTA contract."

Article 20 of the contract between the Federal Aviation Administration and FASTA calls for lists assigning employees to work holidays to be posted 21 days in advance of the holiday.

The supervisor did not see the steward's note until almost two weeks later, and he immediately telephoned the technician. When the technician said the schedule did not show who was working the holiday, the supervisor told him that he was scheduled to work the night shift on May 28.

On May 25 the supervisor spoke with the technician personally, telling him that he was scheduled to work the holiday. Other technicians were present during the conversation. One of them offered to take the steward's place, but his offer was rejected.

The technician did not report for work on Memorial Day. His partner was on annual leave that week, so there was no one on duty and the shift was left open. The supervisor left word to call him if an emergency developed.

The supervisor subsequently met with the technician, in the presence of a FASTA representative, and asked why he had not shown up for work. The technician's answer was that the schedule was not in accordance with the contract and he did not know he was assigned the holiday watch. FAA gave the technician a three day suspension because he had been AWOL and insubordinate.

The technician filed a grievance, arguing that as steward he was challenging a departure from the previous policy of posting the holiday work schedule. "The new policy was a non-indication of who was working and who was not. Although dialogue occurred, no effort was made to correct the situation. I was only asked if I intended to come in. I was not so ordered."

His suspension, he claimed, was because he charged management with violating Article 20.

Management argued that it conformed to Article 20 because the basic watch schedule made clear which teams worked holiday assignments: "As has been the practice, holiday work will be assigned to the team that is on the seven day stretch. The schedule repeats every 28 days." This basic schedule was developed by the employees and had been followed for over two years. Consequently, FAA reasoned, any employee knowing the date of the holiday and the policy could tell from the watch schedule whether he was scheduled to work the holiday.

The grievant rebutted that he had not seen this statement on the basic watch schedule, and that the list of employees working Memorial Day had, in fact, not been posted.

The union claimed that even if some discipline were warranted, the three day suspension was unduly severe.

Issue: Whether the three day suspension of the grievant was for just and substantial cause?

Award: Arbitrator William B. Post found that the three day suspension of the grievant was for just and substantial cause.

There was no doubt in the arbitrator's mind that the grievant was twice directly informed that he was scheduled and expected to work the night of May 28. "Although the grievant claimed a contract violation in the manner in which the watch schedule was made up, he did not file an oral or written grievance. He elected to be absent at a time when he was scheduled to be on duty." He made no claim of illness or inability to come in.

"It is a basic rule of labor relations that an employee must obey first and grieve later," the arbitrator pointed out, "unless a question of safety is involved. The contract specifically provides the procedure to be followed in questions of contract violation. An employee who ignores this procedure does so at his peril.

"The grievant had plenty of time, at least two weeks or more, to try to resolve the question of the holiday posting. Although he claimed to be a steward, he did not approach his supervisor to discuss the matter. Whether the Agency in fact violated the contract by the manner in which it posted the holiday schedule is not the issue before this arbitrator.

"Although the grievant claimed that he had been ordered to work on May 28, he was told on at least two occasions that he was scheduled to work, and he knew he was expected to work. When he did not report, he was absent without leave. In addition he was insubordinate in refusing to follow a direct assignment."

Arbitrator Post found that the grievant deliberately refused to obey a legitimate direction of his supervisor and challenged the authority of his supervisor in the presence of five fellow technicians.

Under the circumstances, said Post, the three day suspension "does not appear unreasonable. It is consistent with the penalties prescribed in FAA's regulations." *(Transportation, FAA and FASTA—January 31, 1980. 4 AIRS #12367)*

AFGE Proposal Ruled Negotiable

The Federal Labor Relations Authority told General Services Administration to bargain on the union's proposal prohibiting management cancellation of flexitime work schedules unless certain conditions were met. The American Federation of Government Employees proposal, said FLRA, falls within management's duty to bargain under Federal sector labor law and the Federal Employees Flexible and Compressed Work Schedules Act of 1978.

AFGE Local 2151 proposed that the activity could cancel flexitime only under the following proviso. An arbitrator must find 1) that continuation of the program would substantially disrupt GSA in carrying out its functions; or 2) the activity was incurring additional costs because of its participation in the program.

GSA, National Capital Region, Washington, D.C. agreed that the Work Schedules Act requires employers and recognized unions to negotiate flexitime. But what GSA contended was that the act grants employers the ability to cancel under certain circumstances, and the union proposal conflicted with those sections of the law.

The Authority found GSA's assertion unsupported by the language and legislative history of the Work Schedules Act. Moreover, it found that AFGE Local 2151's proposal did not violate management's reserved rights under section 7106(a) of the Federal Service Labor-Management Relations Statute. *(3 FLRA No. 37—May 23, 1980)*

Panel Issues First Order on Wage Issue

For the first time the Federal Service Impasses Panel issued a final and binding decision awarding a wage increase to prevailing rate employees. The Panel also ordered the parties to agree to a clause authorizing binding arbitration, *without Panel approval*, for resolution of negotiation impasses. The dispute was between Interior's Colorado River Storage Project and the International Brotherhood of Electrical Engineers Local 2159.

Before issuing its order, the Panel sought a ruling from the Federal Labor Relations Authority on two major policy issues in the case. One issue had to do with the effect of President Carter's "Federal Pay and the Anti-Inflation Program" memorandum on any wage increase which might be granted. The other dealt with the impact of section 704 of the Federal Service Labor-Management Relations Statute on the negotiation of a binding arbitration procedure for impasses. (Section 704 allows prevailing rate employees to retain the right to bargain on wages and other conditions of employment if they were bargaining on these subjects prior to 1972.)

On the basis of the Authority's response and the entire record in this case, the Panel awarded an immediate 5.5 percent wage increase, pending court action on the effect of the President's memorandum.

The wage increase is for FY 1979, with credit given for any prior increase during this period. FSIP made no specific finding as to what the increase should have been on a prevailing rate basis but said that its decision was without prejudice to any future request for assistance from the parties, once the question as to the impact of the President's memorandum was resolved through the courts, and any ensuing negotiations had taken place.

On the issue of methodology for resolving negotiation deadlocks, the Panel cited the Authority's response. The Authority indicated that this kind of provision may be negotiated "without regard to any provisions of [the statute] to the extent that any such provision is inconsistent with section 704."

The Panel accordingly told the parties to negotiate a provision for binding arbitration of interest disputes without the need for Panel approval. *(Interior, Water and Power Resources Service, Upper Colorado Region, Colorado River Storage Project, Page, Arizona and IBEW Local 2159—Case. No. 79 FSIP 38, April 17, 1980, Release No. 146)*

FLRA Denies Request to Issue Policy

A request that it issue a policy statement on the obligation of management to negotiate at the demand of a union during the term of a collective bargaining agreement was turned down by the Authority. The American Foundation of Government Employees had asked for written guidance on this issue.

Before making its decision the Authority solicited the views of interested parties. FLRA then determined that the request did not satisfy standards governing the issuance of a general statement of policy. *(3 FLRA No. 53—May 30, 1980)*

The Office of General Counsel of the Federal Labor Relations Authority has initiated quarterly reports on case handling developments. The reports are intended to keep labor organizations, agencies and other interested persons informed of the policies being pursued by the Office of General Counsel. The GC exercises final authority over the issuance of unfair labor practice complaints and has a primary role in the development of case law under the Federal Service Labor-Management Relations Statute.

The GC's quarterly reports will be part of the subscription to the Authority's Report of Case Decisions and Federal Service Impasses Panel Releases. The subscription price of the package (GC reports, FLRA case decisions and FSIP releases) is $36.00 per year, $45.00 foreign. Subscriptions are available *only* from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

The Federal Service Impasses Panel

A number of actions were taken by the Federal Service Impasses Panel to assist parties in the resolution of negotiation impasses.

The Panel approved a joint request by the parties to use outside, binding arbitration to resolve their dispute on 23 issues including performance evaluation, disciplinary action and adverse action—Department of Labor, Washington, D.C. and American Federation of Government Employees Local 12 *(Case No. 80 FSIP 22, April 22, 1980).*

In two other cases the Panel permitted requests for its assistance to be withdrawn when the parties reached a voluntary settlement. The issues involved were:

- The scope and other aspects of the grievance procedure—Army Corps of Engineers, Vicksburg District, Mississippi and AFGE Local 3310 *(Case No. 79 FSIP 66, April 10, 1980).*
- The revocation period for termination of dues checkoff and the "save harm" clause—89th U.S. Army Reserve Command, Fort Riley, Kansas and AFGE Local 2324 *(Case No. 80 FSIP 7, April 11, 1980).*

When it determined that voluntary efforts to reach a settlement had not been exhausted, the Panel declined to assert jurisdiction—U.S. Naval Oceanographic Office, Bay St. Louis, Mississippi and AFGE Local 1028 *(Case No. 79 FSIP 101(a), April 17, 1980).*

Following factfinding hearings the panel issued a Decision and Order in three cases. The issues were:

- Hours of work, union office space and break periods—Air Force, Sacramento Air Logistics Center, McClellan AFB, California and International Federation of Professional and Technical Engineers Local 220 *(Case No. 79 FSIP 80, April 23, 1980).*
- Union representation, hours of work, and contract duration—Office of Personnel Management, Washington, D.C. and AFGE Local 32 *(Case No. 79 FSIP 53, April 18, 1980).*
- Wearing of the military uniform, official time, scope of grievance and arbitration procedures, and continuance of past practice on warm-weather attire—Louisiana Army and Air National Guard, Jackson Barracks, New Orleans, Louisiana and National Federation of Federal Employees Locals 1707, 1708 and 1737 *(Case Nos. 79 FSIP 51 and 79 FSIP 81, April 22, 1980).*

(Continued from page 1)

The court explained its decision. "Contractual remedies existed to afford appellant the relief he sought in court: His record could have been cleared and the IRS put on notice that such methods of investigation would not be tolerated.

"The general rule requiring exhaustion of administrative remedies is applicable to labor-management disputes where the issue is subject to a contractual grievance and arbitration procedure... This rule applies where, as here, the issue involves alleged violations of the employer's regulations which are subject to the grievance procedure." *(National Treasury Employees Union and Mackin v. Kurtz, Commissioner, et. al., USCA DC, No. 79-1086, May 20, 1980)*

Turning to the regulation's possible impact on unit employees, the ALJ found no evidence that the policy changed the eligibility of unit employees for consideration as EEO counselors; nor did the policy affect provisions in the parties' contract dealing with promotions.

The ALJ noted that the regulation might indirectly affect bargaining unit employees by having some impact on the effectiveness of the EEO program. An employer's obligation, however, "does not embrace every issue which is of interest and which indirectly may affect employees."

As it always does in carryover cases, the Authority said its decision was based entirely on the Executive Order. *(3 FLRA No. 30—May 21, 1980)*

Authority Excludes EEO Counselors from Bargaining Unit at Kelly AFB

In concurrence with its administrative law judge, the Federal Labor Relations Authority dismissed an unfair labor practice complaint against the San Antonio Air Logistics Center at Kelly AFB, Texas. At issue was whether the Center's unilateral institution of a policy rotating full-time EEO counselors out of the EEO program on a periodic basis violated Executive Order 11491. The union, American Federation of Government Employees Local 1617, charged that management failed to bargain on both the new policy and the policy's impact on bargaining unit employees.

The ALJ had concluded that the new regulation did change existing policy and past practice. But since the nine EEO counselors involved perform personnel work in other than a purely clerical capacity, they are excluded from the bargaining unit under section 10(b)(2) of the Order.

Consultant

The Federal Labor-Management

Consultant

Office of

Route to:

FLRC 80-14 July 18, 1980

New Developments Checklist...

Army's Fort Bragg Schools committed ULP against North Carolina Federation of Teachers...p.1

Court dismisses NFFE petition for injunctive relief...p. 1

Did management's discipline of alcoholic employee violate IAM contract?...p. 2

Panel orders FTC-AFGE to accept grievance procedure covering excepted service attorneys...p. 3

FLRA tells activity to cease unilateral limitation of official time...p. 3

Authority declines to issue a major policy statement...p. 3

Federal Service Impasses Panel Tieline...p. 4

Authority rules negotiable an AFGE proposal for broad scope of grievances...p. 4

School Days, School Days

In its first unfair labor practice decision under the new Federal service labor law, the Federal Labor Relations Authority upheld union charges against Army's Fort Bragg Schools. The North Carolina Federation of Teachers, AFT, complained that the activity violated section 7116(a)(1) of the law on five occasions. The first episode occurred when an Army superintendent of schools spoke against collective bargaining at an AFT organizational meeting for Fort Bragg teachers. The other violations took place at four separate schools when principals attended union informational meetings despite union objections.

The activity, in addition to denying AFT's allegations, asserted that the Authority lacked jurisdiction over these employees. Management claimed that the teachers are independent contractors, and the entire Army school system an entity separate and apart from the Federal government. In Army's eyes, the rights of Fort Bragg teachers are equivalent to those of North Carolina public school teachers—and that state prohibits bargaining by public employees.

The Authority's administrative law judge disagreed. The fact that the teachers are employed under personal service contracts is of minor significance in determining whether an individual is an independent contractor or works under a "master-servant" relationship the ALJ said.

"Under common law, the most important element in a master-servant relationship is the right to control the work activities of the individual; the labels used by the parties are relatively important," advised the ALJ. He concluded that the Army has a right to control employees of the Army school system, and the system is an integral part of the Army. The Army's own regulations refer to the instructors as employees working under the supervision of Federal officials.

The Army further argued that the law authorizing Federal property places school personnel in a unique category excluded from coverage of the Federal Service Labor-Management Relations Statute. This argument was not persuasive to the ALJ who found Fort Bragg teachers to be protected by the labor statute. He cited U.S. Comptroller General decisions holding these employees subject to government employment laws unless specifically exempted.

Turning to the ULP charges, the ALJ determined that the presence of principals at the meetings had a chilling effect on the teachers' exercise of their protected rights.

Regarding the issue of remarks made by the superintendent of the Fort Bragg Schools, the intent and effect was to discourage the teachers from filing an election petition, the ALJ declared. The statements clearly interfered with the teachers' right to collective bargaining. Because the superintendent is in charge of the entire school system, including the discipline and annual rehiring of the teachers, his remarks were particularly coercive.

The Authority completely adopted the ALJ's findings and recommendations. *(3 FLRA No. 57—June 10, 1980)*

NFFE Seeks Injunction Against Army

Unions may not petition the courts for injunctive relief in labor disputes with Federal agencies, a U.S. district court in California ruled. In unfair labor practice cases only the Federal Labor Relations Authority can seek a restraining order from a Federal district court, Judge William H. Orrick held. The injunction was requested by the National Federation of Federal Employees Local 1263 to halt a reduction in force at Army's Defense Language Institute.

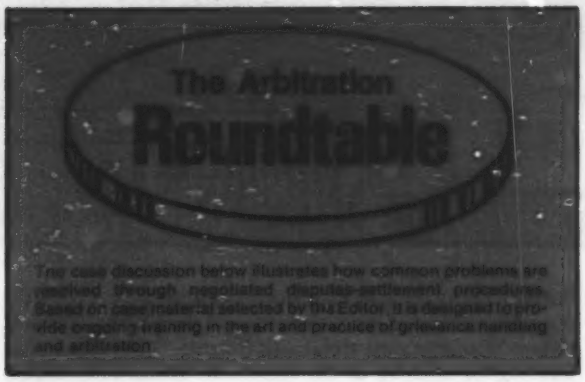
Judge Orrick determined that the Federal Service Labor-Management Relations Statute does not grant private parties the right to seek court injunctions against ULPs. According to the judge, Congress and the statute entrusted these matters to the expertise of the Authority, and this petition is not within the court's jurisdiction.

"The structure of the act itself indicates that Congress intended no independent Federal court jurisdiction over such matters," the judge said, and section 7123 provides for these petitions by the Authority. His decision called attention to similar rulings applicable to the National Labor Relations Board.

"The Court's analysis of the act, the legislative history, the Congressional analogies to the role of the

(Continued on page 4)

PM1.13:



The case discussion below illustrates how common problems are resolved through negotiated disputes-settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

The Case of the Alcoholic Employee

Casefacts: After 16 years of satisfactory attendance at the Naval Air Rework Facility, the machinist's performance began to deteriorate, and he had two unauthorized absences. His foreman, suspecting that alcohol abuse caused the machinist's problems, offered to help him.

In October the machinist notified management that he would be absent several days due to his mother's serious illness, and requested annual leave. He missed five workdays, October 2-6. When the machinist returned to work he submitted a request for sick leave, with a doctor's certificate advising that the worker "was seen for an anxiety reaction and overindulgence in Ethanol intake. Patient became upset over illness of his mother."

The foreman approved the sick leave on October 11, but before forwarding the leave slip he re-examined the certificate and learned for the first time that Ethanol meant alcohol. In November he met with the machinist and a union representative to discuss the matter.

In January the foreman disapproved the leave request on grounds of "insufficient justification," and issued a letter of reprimand for a third offense of unauthorized absence.

The International Association of Machinists took the employee's case to arbitration.

At the hearing both parties relied heavily on Navy's policy on alcohol abuse, which was incorporated into the labor agreement.

The policy states that "the use of alcoholic beverages is of concern to management only when it results either directly or indirectly in a job-related problem... Federal managers will take action in the form of 1) non-disciplinary procedures under which an employee with a drinking problem is offered rehabilitative assistance and 2) failing response which results in acceptable work performance, invoking regular disciplinary procedures for dealing with problem employees."

The policy recognizes the condition as a treatable disease. Employees suffering from the illness are to receive the same consideration and offer of assistance extended to employees with other illnesses. Sick leave will be granted for treatment or rehabilitation as in any other illness.

The policy also spells out in detail steps to be taken by the supervisor. The steps begin with "Be alert... to changes in work and behavior." The fifth and last step says, "if the employee refuses help and his work performance continues to be unsatisfactory, he will be given a firm choice between accepting agency assistance through counseling or professional diagnosis of his problem and cooperation in treatment if indicated, or face appropriate disciplinary action."

The facility argued that until an employee openly admits he has a drinking problem and needs help, management is precluded from labeling him an alcoholic and treating him as such. It was not until early summer that the grievant sought assistance from the facility's psychologist.

Regulations say "although an alcoholic employee is ill... disciplinary action for unsatisfactory job performance or behavior can motivate an employee to recognize that he is ill, channel him into a rehabilitation program and influence him to respond to it in a cooperative and successful fashion." In Navy's view, the problem of controlling sick leave usage would be compounded by allowing sprees to be charged to sick leave.

IAM contended that during his five-day absence the grievant was qualified for annual leave (serious illness of mother) or sick leave (incapacitated from alcoholism for which he was receiving professional treatment).

Issue: Did management's actions violate the contract?

Award: Yes, ruled arbitrator Charles H. Livengood, Jr. His award ordered management to first, rescind the letter of reprimand; second, approve the grievant's application for five days sick leave; and third, reimburse him for pay lost when the application was denied, and charge the five days against accrued leave.

The arbitrator concluded that when drinking impacts adversely on performance and dependability, management has authority to deal with an employee as an alcoholic without waiting for his open admission. The facility erred by insisting that the grievant must first confess his difficulty.

Official policy gives the supervisor a key role, but the foreman did not follow procedures spelled out in the policy. He should have offered rehabilitative assistance, and if that failed, given the employee a choice of accepting help or facing disciplinary action. On the record, no such choice was offered the grievant.

The facility's denial of leave and the reprimand were unjustified because management did not follow Navy policy of recognizing the condition as a treatable disease and granting sick leave for treatment.

Arbitrator Livengood commented that "The facility is not in a good position to complain about the fact that the grievant took nine days to change his mind about what kind of leave he wanted, since management took two and a half months to change its mind about approving his application for sick leave." *(Naval Air Rework Facility and International Association of Machinists—March 13, 1980. LAIRS 12484).*

The Federal Labor Relations Counsel

3 FLMC 80-14 July 18, 1980

Attorneys Gain Coverage Under Grievance Procedure

Should excepted service attorneys have access to grievance and arbitration procedures on the same basis as other members of the bargaining unit? This was the key issue in the negotiation impasse between the Federal Trade Commission's Boston Regional Office and Local 3656, American Federation of Government Employees. The Federal Service Impasses Panel said yes, and ordered the parties to accept the union's proposal granting access.

The Panel also directed the parties to resume bargaining on 14 additional issues and notify it of the results within 30 days. If the dispute remains unsolved, the Panel advised, all outstanding issues will go to arbitration under procedures to be directed at that time.

There are 30 members in the Boston bargaining unit: 12 attorneys in the excepted service, and 18 consumer protection specialists and clerks in the competitive service.

(Federal employees in the excepted service do not have the job protection rights afforded competitive service employees. They can be discharged for reasons other than unacceptable performance at the discretion of management, and without specification of a cause. Excepted service employees who are veterans, however, have special job protection. Traditionally, attorneys are excepted service because of the impracticability of devising entrance exams for them.)

The FTC argued that their attorney's work is so unique they cannot be compared with excepted service employees at other agencies. Further, adoption of the union's proposal would not only change a government-wide condition of employment, but bring needless formality to office procedures.

Local 3656 contended that it is fundamentally unfair to treat excepted employees differently from others in the unit. This is a pressing problem, AFGE said, because management forced a number of non-veteran attorneys to resign over the last two years in lieu of discharge. Without contractual protecton, non-veteran excepted service employees have only one avenue of appeal—costly and lengthy court action.

The union pointed to contracts at the Internal Revenue Service, Consumer Product Safety Commission, and the National Labor Relations Board which give excepted service employees the full protection of grievance procedures.

The Panel concluded that these attorneys should not be treated differently. "We believe," wrote the Panel, "that processing adverse action matters through a negotiated grievance procedures which culminates in binding arbitration offers the potential for quicker decisions and would be less disruptive to the work environment." *(FTC, Boston, Massachusetts and AFGE Local 3656—Case Nos. 79 FSIP 65, 80 FSIP 19, May 29, 1980, Release No. 152)*

As Time Goes By

Rejecting the recommendations of its administrative law judge that no unfair labor practice be found, the FLRA held that Navy's unilateral restriction of official time used by a union president was improper. But in concurrence with the ALJ, the Authority dismissed the union charge that management's refusal to provide the National Association of Government Employees Local R1-144 with a copy of the monthly retention register violated Executive Order 11491.

The Naval Underwater Systems Center, Newport Naval Base and NAGE had not negotiated an agreement concerning use of official time for representational purposes. Nevertheless, for an extended period of time the local president consistently used up to 40 hours a week of official time with the knowledge and consent of his supervisors. Management then told the president that henceforth he would be granted only one hour per day official time.

In the Authority's view, the parties' actions in allowing almost 40 hours to be utilized constituted the establishment by practice of a term and condition of employment. Under these circumstances, Navy should not have restricted the time without first bargaining with NAGE. Failure to do so violated section 19(a)(1) and (6) of the Order, Authority concluded.

FLRA pointed out that it made no finding on whether there was an abuse of the official time allowed. "However, the Authority does not wish to leave the impression that it condones, in any way, abuse or misuse of official time by union officials." If agency management believes that time is being misused, it may take appropriate corrective action, but it may not alter an established practice of allowing a certain amount of time without first negotiating with the exclusive representative.

FLRA's ruling in this transitional case was based solely on the Order and as if the new Federal Service Labor-Management Relations Statute had not been enacted. *(3 FLRA No. 64—June 16, 1980)*

FLRA Rejects Bid for Policy Statement

The Authority denied a union's request for a major policy determination on whether an agency is required to maintain the status quo when the exclusive representative appeals an agency's determination that a proposal is non negotiable under section 7117 of the statute. In this situation, a union may pursue the matter through unfair labor practice procedures, the Authority said. *(3 FLRA No. 56—June 10, 1980)*

The Federal Service Impasses Panel in the Line

A number of actions were taken by the Federal Service Impasses Panel in May to assist Federal agencies and unions in the resolution of negotiation impasses.

The Panel granted a joint request for approval of binding arbitration to resolve an impasse on ground rules—Air Force, San Antonio Air Logistics Center, Kelly AFB, Texas and American Federation of Government Employees Local 1617 *(Case No. 80 FSIP 33, May 14, 1980)*. In an earlier case involving the same parties and a request for Panel assistance *(Case No. 79 FSIP 105, May 8, 1980)*, the Panel declined to assert jurisdiction after the parties advised that they had decided to submit their dispute to an arbitrator.

The Panel recommended that the parties submit their dispute on environmental pay differential to an arbitrator of their choice for a final and binding decision, with arbitration costs shared by the parties—Navy, Strategic Weapons Facility, Pacific, Bremerton, Washington and AFGE Local 2494. *(Case No. 80 FSIP 27, May 30, 1980)*.

Because voluntary efforts to reach settlement had not been exhausted, the Panel declined to assert jurisdiction in two cases:

- Naval Air Engineering Center, Lakehurst, New Jersey and National Association of Government Inspectors and Quality Assurance Personnel Unit 2 *(Case No. 80 FSIP 6, May 8, 1980)*.
- General Services Administration, National Archives and Records Center, Military Personnel Records Center, St. Louis, Missouri and AFGE Local 900 *(Case No. 79 FSIP 117, May 1, 1980)*.

The Panel declined to assert jurisdiction in another case because important issues arising out of the same dispute were pending before the Federal Labor Relations Authority, and their disposition by the Authority could render the impasse moot or cause the parties to substantially modify their bargaining positions—Treasury, U.S. Customs Service, Region VIII, San Francisco, California and the National Treasury Employees Union *(Case No. 80 FSIP 8, May 2, 1980)*.

The parties' request for withdrawal of Panel assistance was granted pending the outcome of a negotiability appeal—Veterans Administration Medical Center, Minneapolis, Minnesota and AFGE Local 3669 *(Case No. 80 FSIP 13, May 6, 1980)*.

Assistance by a Panel-appointed factfinder prior to the hearing led to voluntary settlement in three cases involving the following issues:

- Scheduling of work, scope of grievance and arbitration procedures, leave without pay procedures, and other issues—VA Medical Center, Salisbury, North Carolina and AFGE Local 1738 *(Case No. 79 FSIP 106, May 29, 1980)*.
- Union representation—HEW, Social Security Administration, Cincinnati, Ohio and National Federation of Federal Employees Local 75 *(Case No. 80 FSIP 3, May 8, 1980)*.
- Several issues including tours of duty, duration, and scope of grievance and arbitration procedures—Agriculture, Science and Education Administration, Eastern Regional Research Center, Philadelphia, Pennsylvania and AFGE Local 1331 *(Case No. 80 FSIP 2, May 6, 1980)*.

In two other disputes the Panel permitted requests for its assistance to be withdrawn when the parties reached voluntary settlement. The issues in those cases were:

- Wages—Interior, Bureau of Indian Affairs, San Carlos Irrigation Project, Coolidge, Arizona and NFFE Local 526 *(Case No. 79 FSIP 97, May 29, 1980)*.
- Grievance procedure, hours of work and sick leave—VA Medical Center, New Orleans, Louisiana and NFFE Local 1904 *(Case No. 80 FSIP 16, May 9, 1980)*.

(Continued from page 1)

NLRB, and the judicial interpretations of the NLRA holding that Federal courts lack jurisdiction at the behest of private parties to enjoin alleged unfair labor practices, compels the conclusion that this court is precluded from entertaining the instant suit," concluded Judge Orrick. The court dismissed the case. *(NFFE Local 1263 v. Commandant, Defense Language Institute, et. al., USDC ND Cal., No. C-79-2952-WHO, April 21, 1980)*

VA Must Bargain on AFGE Proposal

The Authority ruled negotiable an AFGE proposal for a broad scope of grievances which excluded only matters subject to statutory appeals procedures. The Authority found no merit in the Veterans Administration's contention that VA need not bargain because the proposal did not specifically list matters barred by law.

The scope of the grievance procedure extends to all matters which, *under the provisions of law*, could be covered unless the parties agreed to specific exclusions, the FLRA noted. If an activity believes certain matters to be excluded by operation of law, it can raise them before the arbitrator as issues of grievability or arbitrability. If an agency objects to an arbitration award for the same reasons, it can challenge the award by filing an exception with the Authority. *(3 FLRA No. 48—May 30, 1980)*

Consultant

The Federal Labor-Management

Consultant

1 FLMC 80-10

August 1, 1980

United States of America
Office of
Personnel Management
Route to:

New Developments Checklist...

OPM intervenes in payment of travel and per diem expenses to unions...p.1

Authority turns down NTEU request for broader policy statement on travel, per diem payment...p.1

FLRA employees vote yes for union...p.1

Arbitration back pay award conflicts with civil service law...p.1

Should IRS employee be disciplined for divulging confidential tax returns?...p.2

Union proposal to evaluate EEOC supervisors ruled nonnegotiable...p.3

ALJ's recommendations partly accepted by FLRA...p.3

First FLRA annual report now available from Government Printing Office...p.3

Same issue cannot be pursued under two avenues of redress...p.4

AFGE, IRS lose bid to have NTEU election petition dismissed...p.4

No bargaining on overtime pay, Authority rules...p.4

Federal Service Impasses Panel Tieline...p.4

NEWARK PUBLIC LIBRARY

AUG 15 1980

U. S. GOVT. PUBS.
DEPOSITORY

OPM Challenges Authority's Policy on Travel Payment to Unions

OPM is challenging a major policy statement of the Federal Labor Relations Authority that employees representing an exclusive representative in negotiations are entitled to travel and per diem expenses as well as official time. The policy statement, *2 FLRA No. 31*, was issued last December.

The issue of payment for travel and per diem is now pending before the Authority in at least four cases, and OPM has intervened in three.

OPM's first intervention is in an unfair labor practice complaint by the Association of Civilian Technicians against the New York National Guard. After negotiations were completed, ACT presented the activity with a bill for travel and per diem expenses, but the Guard refused to pay. The union promptly charged the Guard with violations of sections 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute.

OPM's motion for intervention, signed by Director Alan K. Campbell, says "Because of OPM's role as the principal personnel agency of the executive branch, and because I have been designated by the President as his principal advisor in labor-management relations. OPM seeks to intervene in this case to address this important issue which will have government-wide impact."

The other two cases where OPM filed as intervenor cover the same issue. The National Treasury Employees Union is the charging party against the Internal Revenue Service and the U.S. Customs Service.

FLRA Declines to Issue Broader Policy on Travel Payment to Unions

The Authority has decided not to answer a request for a general statement of policy concerning the payment of travel expenses to employees on official time while representing their union. The question, posed by the National Treasury Employees Union, covered broader payment of travel and per diem expenses. Unions are currently entitled to travel payment for negotiations, but not for other representational matters.

NTEU asked "Whether employees who are on official time under 5 U.S.C. Section 7131(d) while representing an exclusive representative, or in connection with other matters covered by 5 U.S.C. Chapter 71, are entitled to payments from agencies for their travel and per diem expenses?"

The Authority concluded that the request did not satisfy its standards on policy statements and guidance. This matter, said FLRA, could be more appropriately resolved through negotiations. *(3 FLRA No. 78—June 27, 1980)*

FLRA Staff Votes for Representation

Nonsupervisory employees at the Federal Labor Relations Authority voted in favor of representation by the independent Union of Authority Employees. Although the Federal Service Labor-Management Relations Statute specifically exempts FLRA employees from coverage, Authority Chairman Ronald W. Haughton determined that the agency would voluntarily recognize the union. The American Arbitration Association conducted the election by mail ballot.

FLRA Overturns Arbitration Award

A decision by Arbitrator William Eaton was overturned by the Federal Labor Relations Authority on the grounds that the award conflicted with civil service law and regulations. The case involved a temporary employee whose request for conversion to career status was denied by the Mare Island Naval Shipyard. The employee's representative, Federal Employees Metal Trades Council, had grieved that he was improperly denied the conversion because of his union activities.

Arbitrator Eaton ruled for the union, concluding that the shipyard's action violated the contract. As a remedy, the arbitrator ordered that the grievant be converted to permanent status and be awarded back pay for work lost as a result of his employer's improper action.

(Continued on page 4)

PM1.13:

This is Strictly Confidential

Casefacts: In her two years on the job, the appointments clerk at the Internal Revenue Service in Texas had been having difficulties with management. To correct what she perceived as wrongs against herself, the clerk wrote three congressmen and the Civil Service Commission protesting alleged unfair treatment and improper practices by the Service. The letters contained the names of 16 taxpayers and confidential tax information.

Management charged the employee with violation of IRS rules of conduct: "Employees may not divulge or make known in any manner, except as provided by law, any information contained in any tax return..."

The clerk got a three-day suspension, and her union, the National Treasury Employees Union, took the case to arbitration.

The clerk did not deny sending the letter, but said at the time she sent it she did not know that disclosure of tax information was prohibited. She had not been given a copy of the rules of conduct until two months after her disclosures. In rebuttal, management produced a receipt for the rules signed by the grievant when she started work.

The union pointed to Article 33 of the contract whereby "An employee will have the right to raise as a defense to disciplinary action lack of necessary training." NTEU contended that since the activity failed to train the grievant with respect to prohibitions on disclosure of tax information, she could not be disciplined for breach of the rule.

The group manager testified that he "felt very confident" that he had briefed the clerk on the rules when she first started working, although he could not give a specific date to the conversation. The grievant, on the other hand, testified that he had not briefed her.

NTEU raised the argument that the disclosure was an unintentional and minor violation. The clerk was acting under the erroneous impression that whatever strictures existed against disclosure of information outside the agency did not apply to Congress and other Federal agencies.

NTEU further contended that a three-day suspension was too servere and bore no rational relationship to the goal of preventing undesired conduct. The union also introduced extensive evidence to show that the action was taken in retaliation against the grievant because of her past disagreements with management.

Issue: Did the three-day suspension promote the efficiency of the Service in accordance with Article 33 of the contract?

Award: Arbitrator Raymond Goetz denied the grievance, finding that the reprimand did not promote the efficiency of service.

He did not accept the grievant's argument that she had not received a copy of the rules of conduct until after her disclosure. She signed a receipt for the rules, he said, and "persons do not normally sign receipts for items not received." The arbitrator found that it was the employee's responsibility to obtain a copy of the rules of conduct if it had not been included in her orientation package as she claimed, since by signing the receipt she became aware of the existence of these rules

"Even accepting the grievant's testimony about lack of training at face value," the arbitrator stated, "it does not follow that her unauthorized disclosures must necessarily be excused on the basis of Article 33. The clause does not require that discipline be overtuned whenever an employee has not received personal training with respect to a particular offense for which discipline is being imposed."

He ruled that in this case the requirement for training had been satisfied by the rules of conduct, and it was incumbent upon the grievant to discuss the matter with her supervisor before making any disclosure she might feel was prohibited.

The grievant's erroneous impression that there was no restriction regarding disclosure to Congress and agencies did not get her off the hook. Arbitrator Goetz held the disclosures to be a willful and deliberate action on her part. Lack of intent, he said, does not alter the fact that the rule was violated.

This was not a minor violation—taxpayers might well object to having their tax information in the hands of anyone outside IRS. "The objective sought to be achieved by the discipline was preservation of the integrity of the existing system of voluntary tax compliance. To make this system work, it is "essential" that the taxpayer be completely assured that his data be kept in confidence within IRS.

"Some sort of discipline was clearly called for, and anything less than a three-day suspension might have been meaningless," Arbitrator Goetz ruled. He commented that the Service showed a great deal of leniency by suspending the grievant for only three days.

The arbitrator found no objective evidence that management action was influenced by any personal animosity. *(Internal Revenue Service and National Treasury Employees Union—May 12, 1980. LAIRS #12660)*

AFGE Proposal to Rate Supervisors Ruled Nonnegotiable by Authority

An annual review of supervisors by employees was the first part of a proposal by the National Council of EEOC Locals No. 216, American Federation of Government Employees. The second part would prohibit supervisors who had not received the training required by FPM and OPM regulations from disciplining employees. Management at the Equal Employment Opportunity Commission refused to bargain on either part, arguing that the subject matter was not negotiable. The Authority sustained the Commission's argument that the proposal was outside the scope of bargaining under section 7117 of the Federal Service Labor-Management Relations Statute.

"The assessment of supervisory performance," said the Authority, "and the training of supervisors as a precondition to the exercise of management's right to discipline do not involve the conditions of employment of bargaining unit employees." The Authority also called attention to its recent decision in a similar case, *3 FLRA No. 44*, which held that the union proposal went beyond the representation right of the exclusive representative. *(3 FLRA No. 80—June 27, 1980)*

IAM Charges Navy Was Unfair

Noting that the administrative law judge concluded that Navy's unilateral termination of a labor agreement was justified, the Federal Labor Relations Authority disagreed, finding a violation of Executive Order 11491. The Authority concurred with the second part of the ALJ's recommendation—that Navy's conduct prior to an election was not improper—but for different reasons.

The case stemmed from a reorganization at the Naval Air Engineering Center, Lakehurst, New Jersey. The Assistant Security for Labor-Management Relations ruled that several existing bargaining units at the Center were no longer appropriate for exclusive recognition, and directed an election among a residual unit of employees.

The Navy, relying on its interpretation of the A/SLMR decision, withdrew recognition from the International Association of Machinists Local 2581 and the other unions. When IAM filed grievances under its contract, the activity processed them under the agency grievance procedure rather than the negotiated procedure.

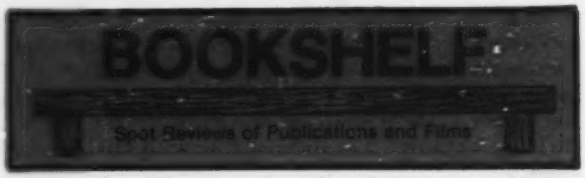
IAM charged that management's withdrawal of recognition and termination of the contract, including use of the negotiated grievance procedure, constituted an unfair labor practice. In addition, IAM alleged, these actions by Navy affected the runoff election results and were a basis for setting aside the election.

The ALJ determined that Navy had no obligation to continue to accord exclusive recognition to any of the unions as exclusive representative. Accordingly, he said, Navy did not violate the Order when it declared that IAM contract no longer valid. And for essentially the same reasons the ALJ found without merit IAM's objection to management's conduct regarding the runoff election.

Contrary to its ALJ, the Authority said that while the issue of representation is being processed, an agency must maintain recognition and adhere to the agreement to the maximum extent possible. Thus, Navy's withdrawal of recognition and other actions violated section 19(a)(1) and (5) of the Order. The Authority's reasoning was based on a decision under the Order, *4 FLRC 484*.

On IAM's claim that the runoff election should be set aside, the Authority ruled that the objection was untimely filed. The period preceeding a runoff election which may be used as grounds for setting aside the runoff election begins from the date of the first election. Conduct prior to the first election, which was not urged as an objection to that election, may not be used to set aside the runoff election. The Authority concluded that the management actions to which IAM objected took place prior to the first election and therefore could not be considered as grounds for setting aside the runoff election.

The Authority's decision was made solely on the basis of the Executive Order and as if the new Federal Service Labor-Management Relations Statute had not been enacted. *(3 FLRA No. 93—July 3, 1980)*



The *First Annual Report* of the Federal Labor Relations Authority and the Federal Service Impasses Panel is being prepared for publication by the Government Printing Office. The publication covers the Authority's initial fiscal period, January 1—September 30, 1979.

The Report describes the operations and significant case actions of the Authority, its General Counsel and the Impasses Panel, with a case index for quick reference. The introduction reviews Federal employee labor-management relations before and after 1978, including the development of the statute.

When the 1979 Report is printed, organizations and individuals may order copies directly from the Government Printing Office, Washington, DC 20402. Government agencies had until July 28 to order bulk supplies by riding FLRA Printing Requisition No. 80-0090, on Standard Form 1. *All inquiries on this publication should be submitted directly to GPO.*

The Federal Service Impasses Panel reported on three cases where Panel actions led to settlement of negotiation disputes.

Using the final-offer selection procedure, the Panel chose the union's proposal concerning composition of the ranking panel for the management/technical intern program. FSIP had previously declined to assert jurisdiction on the related issues of 1) incorporating the final regulation as a supplement to the parties' master agreement and 2) the status of an intern who failed to complete the program—Air Force Logistics Command, Wright-Patterson AFB, Ohio and American Federation of Government Employees Council 214 *(Case No. 79 FSIP 99, May 7, 1980).*

A Panel decision and order resolved a deadlock over sick leave, prescheduled sick leave, hours of work, and adverse actions. The Panel declined to assert jurisdiction over a wage-fixing issue, and referred the parties to the FLRA for decisions on negotiability matters—Treasury, Bureau of Engraving and Printing, Washington, D.C. and International Brotherhood of Electrical Workers Local 121 *(Case No. 79 FSIP 98, May 29, 1980).*

As a result of a recommendation made by the Panel, the parties resolved their dispute over the amount of official time for union officers and stewards. The parties adopted the union's proposal—Air Force, 2853 Air Base Group, Nonappropriated Fund Activities, Robins AFB, Georgia and AFGE Local 987 *(Case No. 79 FSIP 112, April 28, 1980).*

(Continued from page 1)

The shipyard petitioned the Authority for review of the award.

When the Authority sought OPM's interpretation, OPM responded that the award violated applicable law and rules. The grievant's temporary appointment did not entitle him to a subsequent position. Management has the discretion to fill positions in the competitive service, and it cannot abrogate that discretion through contractual provisions granting an arbitrator the authority to exercise management's reserved right. Accordingly, OPM said, the arbitrator's order to convert the employee was inconsistent with civil service rules.

OPM also pointed out that the Back Pay Act applies only to Federal employees; it does not apply to unsuccessful applicants for employment. The arbitrator, therefore, had no authority to order back pay for the grievant.

Based on OPM's advisory opinion, the Authority set aside the arbitration award. *(3 FLRA No. 90—June 30, 1980)*

Just One Bite Out of the Apple

In concurrence with its administrative law judge, the Authority dismissed an unfair labor practice complaint against the Internal Revenue Service's Chicago office for lack of jurisdiction. The ALJ found that the National Treasury Employees Union had earlier raised the same issue as a grievance. The Federal sector labor relations statute and the previous Executive Order 11491 prohibit using *both* the unfair labor practice procedure and the negotiated procedure to litigate the same issue.

The union had alleged that management's refusal to furnish employees with information they requested in disciplinary proceedings was unfair. Prior to filing the ULP complaint, NTEU grieved the activity's nonproduction of the information.

The ALJ emphasized that the case did not involve an allegation that an agency refused to provide an exclusive bargaining representative with information necessary to carry out its bargaining responsibility. *(3 FLRA No. 75—June 28, 1980)*

NTEU's Petition Held Timely

The Authority ruled timely filed an election petition by the National Treasury Employees Union for a bargaining unit at the Internal Revenue Service, North Atlantic Service Center, Andover, Massachusetts. The open period for filing an election petition during the term of an existing contract is measured from the date the contract goes into effect, rather than the date the contract is signed, the Authority said. The union already holding exclusive recognition, the American Federation of Government Employees Local 2078, and the activity had asserted that NTEU's petition was outside the open period. **(3 FLRA NO. 59—June 10, 1980)**

Bargaining on Overtime Pay Banned

The union's proposal for double pay for overtime work on Sunday was ruled out by the Federal Labor Relations Authority. The Authority's decision upheld the contention by Agriculture's Federal Grain Inspection Service that the proposal was not negotiable. The Council of Federal Grain Inspection Locals, AFGE, had made the proposal when bargaining for field office employees.

Under the Federal Service Labor-Management Relations Statute, section 7103(a)(14), matters "specifically provided for by Federal statute" are expressly excluded from the scope of management's duty to bargain, said the Authority. The FLRA also cited legislative history of the labor law that "rates of overtime pay are not bargainable because they are specifically provided for by statute." *(3 FLRA No. 85—June 27, 1980)*

The Federal Labor-Management

Consultant

1 FLMC 80—16

August 15, 1980

United States Civil Service
Office of
Personnel Management
Room

New Developments Checklist...

FLRA issues amended rules on negotiability disputes...p.1
Back pay ordered for overseas teachers...p.1
Arbitration award partly upheld, partly overturned...p.1
Did SSA's action on complaint violate contract?...p.2
ULP of bargaining unit member against AFGE is dismissed...p.3
Union proposal on EEO goals ruled negotiable...p.3
Bargaining on NFFE proposal at option of DARCOM...p.3
Bookshelf...p.4
First use of post complaint-prehearing formal settlement at VA...p.4
Moonlighting criteria okayed for bargaining...p.4

Authority Issues Amended Rules to Expedite Negotiability Reviews

The Federal Labor Relations Authority issued amended rules facilitating court review and compliance action on negotiability disputes. Under the new rules, a negotiability decision of the Authority will include an order directing bargaining or dismissal, or indicating that the issue is permissively bargainable. Compliance procedures will also apply to orders issued in negotiability matters. The rules become effective September 1, 1980. The regulations appeared in the *Federal Register* of July 21 and July 28, 1980.

A Laborer Is Worthy of Her Hire

An award by Arbitrator Ida Klaus ordering back pay for overseas teachers is upheld by the Federal Labor Relations Authority. The Department of Defense Dependents Schools had petitioned for review of the award on the grounds that it was contrary to Federal law and regulation. The grievance, raised by the Overseas Education Association in 1977, sought pay for teachers attending curriculum review committee meetings at an elementary school in Augsburg, Germany.

The parties' contract calls for meetings of the review committee to be on "official time." The meetings usually begin at 3:20 p.m., the end of the school workday for teachers, and last about an hour. Asserting that "official time" means "school workday," the union asked the principal to grant one hour of release time to teachers attending the meetings. (Release time refers to the release with pay of a teacher from the completion of classroom duties, either by dismissing the class early or using a substitute teacher.)

Arbitrator Klaus ruled that official time means school workdays. She noted that the school conceded that it grants release time for teachers attending the committee meetings at area and regional levels but not at the school level. In the arbitrator's judgment, the negotiated agreement does not permit disparate treatment of meetings at the school level. As a remedy, the school must pay extra duty compensation for time spent by teachers at these meetings since September 1977.

Management argued that the award violates the Overseas Teachers Pay Act and its implementing regulations, as well as the Back Pay Act. The Overseas Teachers Pay Act and rules make no provision for payment of overtime, the activity contended.

The Authority concluded that the agency had not proved its argument. In FLRA's opinion, the teachers pay law and rules grant broad discretion in providing for compensation of teachers. The Authority accordingly found no basis for acceptance of the petition for review. *(3 FLRA No. 108—July 18, 1980)*

Arbitration Award Partly Overturned

Partially sustaining an award by Arbitrator Fred L. Rockwell, the Federal Labor Relations Authority overturned the remainder because it violated OPM directives. The arbitrator had ruled that the non-promotion of a bargaining unit employee at the National Bureau of Standards did not conform to the labor agreement. Consequently, Arbitrator Rockwell directed, the grievant should be promoted but without back pay. The Authority set aside the promotion.

Under the contract between the Bureau and the American Federation of Government Employees Local 2186, "Management will make every effort to utilize to the maximum the skills and talents of its employees... Primary consideration will be given to filling vacant positions through the promotion of present employees." The grievance arose when the Bureau selected an applicant from outside the agency although three Bureau employees were also candidates.

The arbitrator determined that the agency's selection was defective since management made no effort to utilize to the maximum the skills of its employees or to give them primary consideration. His remedy ordered the Bureau to promote the grievant to the position of tool and parts attendant.

He could not award back pay, Arbitrator Rockwell said, since the grievant would not have received the assignment even if no unwarranted personnel action took place. The evidence did not meet criteria required by the Back Pay Act that "but for" the wrongful action of the activity the loss of pay would not have occurred.

The Authority relied on OPM's interpretation of the Federal Personnel Manual in reaching its decision. Management's right to select or not to select a particu-

(Continued on page 4)

PM 1.13:

Dial M for Management

Casefacts: A claims man at the Social Security Administration called one of the field representatives and was told by the secretary that her boss was out. The secretary inquired whether he wanted to leave a message, but he declined, asking to talk to someone higher up. The secretary then transferred the call.

When the field representative returned, his secretary told him she was upset by the claims man's phone call and his arrogant, argumentative and condescending manner. The representative promptly lodged a complaint with the manager of the claims man's section. Both the field representative and his secretary talked to the manager.

The manager wrote up a memorandum on the complaint and gave it to the claims man's supervisor a few days later. The supervisor decided not to discuss it with the employee until his job performance interview. He saw no reason to act quickly since he did not consider it a disciplinary matter. The supervisor then attached the memo to the outside of the grievant's personnel extension file.

Although the incident occurred on February 22, it was not until May 5 that the supervisor talked to the employee. It was thus over two months before the employee learned of the memo in his file.

The claims man, an American Federation of Government Employees officer, believed that management's action violated the contract. He instituted a grievance.

The contract requires that before any adverse information is put in a personnel file, it must first be called to the attention of the employee, and the employee be given the opportunity to present his or her side of the story. If necessary the employee can request that another memo be put in the file telling the story as he or she sees it.

At the arbitration hearing the parties argued for an entire day on a number of contract provisions, as well as SSA rules. The arbitrator, however, commented that the case really turned on the purported telephone conversation.

Statements made in the memo were not borne out by testimony at the hearing. The manager said that both the field representative and the secretary complained to her of the grievant's manner. Yet at the hearing, the representative clearly said that he himself had not spoken to the grievant on February 22.

The secretary testified that the grievant was not loud or profane—it was his manner and voice inflection which upset her. "He didn't speak in his normal voice—he put on a voice," she said. She stated that when the section manager asked if she wanted to file a complaint against the grievant she said no.

The grievant declared that he did not even remember the phone call. He certainly did not recall one in which he was argumentative or condescending to anybody.

The grievant's supervisor admitted that he could have put the memo immediately on the grievant's desk and talked to him at the earliest moment. If he had it to do over again, that is the course that he would have followed. The supervisor felt he was within regulations because he attached the memo to the outside of the file rather than placing it inside.

The grievant was out of the office for a considerable time on jury duty and sick leave, but there were several days when he could have been informed. No attempt was made to do so.

Issues: Did the employer violate the contract and regulations by placing a memorandum of a February 22 telephone call to the secretary in the grievant's personnel file? Did the grievant have an opportunity to place a timely response to the memorandum in his file?

Award: Arbitrator Vincent D. McDonnell concluded that on the first issue the agency violated the contract in preparing a memorandum which was not sustained by the facts. "This arbitrator finds little distinction between attaching the memorandum outside rather than placing it inside the file. Obviously, as to issue two the grievant was not given the right of a timely response to the memo. The memorandum and all other matters relating to it are to be expunged from the grievant's file."

The union requested that the manager and the field representative apologize to the grievant and that both be trained in proper handling of such matters, but the arbitrator considered neither of these remedies necessary. He suggested that in the future the manager investigate a little more before writing such a memorandum.

Arbitrator McDonnell observed that although the memo was based on what the manager believed she was informed by the secretary and the field manager, at the hearing they did not support the statements made in the memo.

"There is no substantiating evidence which would have permitted the placing of the memorandum in the file. That memorandum is either full of inaccuracies or the secretary was telling one story to the manager and certainly another at the hearing. We must assume the latter one is correct since it was given under oath." Additionally, said the arbitrator, the delay in informing the grievant was inordinate. *(Social Security Administration and American Federation of Government Employees—December 19, 1979. LAIRS #12564)*

Member's Charge Against AFGE Dismissed

AFGE Local 987 should have carried my grievance to step 5, charged the bargaining unit member, and the reason it didn't was that I supported a candidate opposing the local's president. But when her unfair practice complaint was heard, the FLRA concurred with its administrative law judge in finding no breach of duty by the union. The case was dismissed.

The ALJ noted that a union must represent employees fairly and without discrimination. Its obligation is violated by arbitrarily ignoring a meritorious grievance or processing it in a perfunctory manner. In this case, he said, the evidence established at most an innocent mistake which may have terminated a meritorious grievance. For the Authority to continually second-guess a union's admitted mistakes in handling grievances, would be destructive to good bargaining relationships and responsible representation.

There is a need to protect the union's financial resources and thereby its effectiveness, the ALJ concluded. "This factor acquires even greater weight in the Federal sector where labor organizations cannot compel the payment of dues... and where they often represent units which dwarf their dues-paying membership."

The Authority stated that its decision was based entirely on Executive Order 11491 and as if the new Federal labor law had not been enacted. *(3 FLRA No. 115—May 23, 1980).*

AFGE Prevails with EEO Proposal

The National Archives and Records Service, General Services Administration, should bargain on the union's proposal regarding EEO goals, the Federal Labor Relations Authority determined. The proposal by Local 2578, American Federation of Government Employees calls for setting a hiring goal of women and minorities at the same percentage as those groups constitute of the local or national population, whichever is higher.

The service raised three objections to the proposal. First, it is inconsistent with OPM regulations implementing the Federal Equal Opportunity Recruitment Program. OPM regulations specify the use of local or national civilian *labor force* data in determining underrepresentation, while the proposal uses *population* data. Second, the union proposal requires the use of a higher percentage in establishing goals for eliminating underrepresentation than permitted by OPM.

The employer's last objection was that by requiring the selection of an in-house candidate if the candidate is a member of a minority group, the proposal violates management's right to select under section 7106(a)(2)(C) of Federal labor law.

AFGE responded that the intent of its proposal was "civilian labor force" rather than "population."

On management's first point, the Authority concluded that since the union expressly agrees with the agency on the use of civilian labor force data, this part of the proposal is consistent with OPM regulations.

As to the second point, the FLRA said that while OPM rules generally require agencies to use the higher of the two percentages, in certain circumstances they are permitted to use the lower percentage. When an activity is located in a geographical area where the percentage of minorities in the local labor force is lower than their percentage in the national labor force, the activity has the discretion to use the lower percentage. Accordingly, the Authority judged, the manner in which the agency exercises that discretion is a matter subject to the duty to bargain and is not inconsistent with OPM regulations.

And finally, the Authority said, the proposal does not restrict management from recruiting externally. It merely sets forth a certain statistical goal for the elimination of underrepresentation. Thus the proposal does not prohibit management from exercising its reserved rights. *(3 FLRA No. 96—July 10, 1980)*

NFFE Proposal Negotiable at the Option of DARCOM

The Authority gave the green light to bargaining over a freeze on hiring from outside during a realignment of the work force—but only if the employer opts to bargain. FLRA's ruling upheld management at the Army Materiel Development and Readiness Command (DARCOM) in Alexandria, Virginia. DARCOM had asserted that the proposal by the National Federation of Federal Employees Local 1332 was not within its duty to bargain. Instead, said DARCOM, the proposal was negotiable only at the election of the agency under section 7106(b)(1) of the Federal Service Labor-Management Relations Statute.

According to the union's proposal, "The Employer will negotiate with the Union as to whether a freeze of all hiring from outside is necessary for the duration of the realignment or until personnel actions under the realignment have been completed and all Transfer-of-Function and Reduction-in-Force employees have had the opportunity to fill vacancies. Except as provided in subparagraph a, below, before any positions in the organizations are filled from outside, all in-house employees will be satisfactorily placed."

The Authority said the clear meaning of section 7106 is to render proposals concerning the numbers and types of employees assigned to an organizational subdivision, or integrally related to such numbers and types, negotiable only at the election of an agency.

NFFE's proposal, in the Authority's judgment, is directly and integrally related to the number and types of employees assigned. Consequently, bargaining is at the option of the employer, and in this case DARCOM has decided not to bargain. *(3 FLRA No. 97—July 10, 1980)*

A new publication on Federal sector labor relations has just been issued. Those interested should order promptly as the supply is limited.

• *Decisions and Interpretations of the Federal Labor Relations Council, Volume 6*, January 1, 1978 through December 31, 1978. Stock #052-003-0711-8, price $20.00. **Order from Superintendent of Documents**, Government Printing Office, Washington, DC 20402, telephone 202-783-3238.

(Continued from page 1)

lar individual cannot be abridged unless there is a direct causal connection between an agency's unwarranted action and the failure to select a particular candidate. The arbitrator had expressly acknowledged that the grievant would not in any event have been selected for the post. Therefore, said the Authority, the required "but for" relationship did not exist. *(3 FLRA No. 98—July 10, 1980.)*

FLRA OK's First Formal Agreement to Settle Unfair Labor Practice

In the first use of a post complaint-prehearing formal settlement, the Authority approved a formal agreement between the Veterans Administration and Local 3306, AFGE to settle an unfair labor practice complaint. The Authority's order calls for a lengthy *mea culpa* by the VA Medical Center in Canandaigua, New York. The Center must post notice that it will not threaten occupational therapists and other employees with unusual tours of duty, denial of annual leave, imposition of new schedules, or adverse action in order to discourage them from union activity or filing unfair labor practice charges.

The employer cannot deprecate the representation of therapists by union representatives, or order stewards to leave management-employee meetings dealing with ULP charges. Nor can VA make statements to the therapists that communications with a union must go through supervisors, or that employees seeking union assistance are disloyal and should seek employment elsewhere.

"We will not remove work-related material from occupational therapists or engage in their surveillance, other than that required for normal supervision," says the notice. It also says VA will not by-pass the union, or fail to offer AFGE the opportunity to be present at formal discussions.

The Authority favors the use of formal or informal settlements by the parties to resolve ULP issues, even after the regional director issues a complaint. Formal settlement agreements must be accepted by the regional director and submitted to the Authority for approval. In formal settlements the parties waive the right to a hearing and agree that the Authority order the respondent to take action appropriate to the terms of the settlement.

This VA—AFGE settlement provides for the entry of a consent order by the Authority and a consent judgment by a U.S. Court of Appeals. *(3 FLRA No. 94—July 10, 1980)*

IRS Will Bargain on Moonlighting

Criteria for moonlighting and the incorporation into a contract of sections of the Civil Service Reform Act are negotiable, the Authority ruled. Accordingly, the Internal Revenue Service must bargain on these proposals made by the National Treasury Employees Union. IRS had alleged that the subjects were outside its duty to bargain.

The moonlighting proposal sought to establish criteria to be used in approving or disapproving applications for outside employment submitted by IRS employees. IRS contended that moonlighting is not a condition of employment affecting bargaining unit employees. The agency further argued that the proposal violated a reserve management right to discipline employees.

The Authority, however, concluded that this matter is definitely related to personnel practices and procedures affecting employees. FLRA found nothing in the proposal that would restrict the agency's right to discipline.

NTEU's second proposal attempted to include in the contract CSRA provisions on prohibited personnel practices and merit system principles. The union wanted these provisions in the contract so they could be enforced through the negotiated grievance procedure.

IRS claimed that part of the sections deal with recuitment and hnece do not relate to unit employees. Other sections, IRS said, interfere with management rights.

In judging this second proposal negotiable, the FLRA concluded that Congress, in enacting the CSRA, never intended to exclude matters of merit system principles and prohibited personnel practices from coverage of a negotiated grievance procedure. *(3 FLRA No. 112—July 23, 1980)*

The Federal Labor-Management

Consultant

SEP 18 1980

U.S. GOVT. PUBS

Office of Personnel Management

Route to:

August 25, 1980

New Developments Checklist

Authority issues long-awaited decisions on negotiability of performance standards...p.1
Rest breaks for switchboard operators at VA center is issue before arbitrator...p.2
Flow chart shows pre-election and post-election procedures...p.3
AFGE petition for unit consolidation is dismissed...p.4
FLRA rules union-sponsored training is negotiable subject...p.4

FLRA Issues First Two Decisions on Negotiability of Performance Standards

On July 31, the Federal Labor Relations Authority issued its first decisions in two leading cases involving the role unions will have in establishing performance standards, critical elements and other aspects of performance appraisal systems. The FLRA found that the determination of performance standards and critical elements for Federal employees is not within the scope of management's duty to bargain. The Authority reasoned that union proposals which identify critical elements and establish the specific content of performance standards are nonnegotiable because to bargain on these items would directly interfere with management's exclusive right to assign work and direct employees. Unions do, however, have the right to bargain collectively on the procedural aspects of performance appraisal systems, as well as the impact and implementation of management decisions concerning performance appraisals.

Background

This ruling by the FLRA will have immediate government-wide impact. Under the Civil Service Reform Act of 1978 (CSRA), Federal agencies are required to establish and communicate performance standards covering each of their employees not later than October 1, 1981. The results of these appraisals are to be used by the agency as a basis for training, rewarding, reassigning, promoting, reducing in grade, retaining and removing employees.

Sixteen petitions were filed with the FLRA requesting the Authority to rule on the negotiability of proposals relating to the establishment of performance standards. Oral arguments were made before the Authority by six labor representatives and 11 management spokespersons on March 4-5, 1980. Extensive briefs were also submitted on the issues.

Establishing Performance Standards

The first edition issued by the Authority, (*3 FLRA 119—July 31, 1980*), involved the negotiability of a proposal presented by the National Treasury Employees Union (NTEU) to the Department of the Treasury, Bureau of the Public Debt. This proposal established a specific number of batches per hour as the minimum standard for job retention for accounts maintenance clerks.

The Authority found that this proposal is within the framework of the right of management to direct its employees and to assign work, and hence it is nonnegotiable. Management's right to direct employees and assign work is exercised through supervising and determining the quantity, quality and timeliness of work production and establishing priorities for its accomplishment. A meaningful performance standard must measure an employee's output against management's yardstick if management is to retain its rights.

Performance standards are significant not only in terms of evaluating individual employee's performance. Standards taken together represent the amount of work needed from each employee in order to accomplish the agency's mission. In this connection, the legislative history of CSRA shows Congressional concern with promoting government effectiveness and efficiency. The development of employee performance standards and critical elements is meant to be used as one means of achieving this objective.

Union's Role in Performance Appraisal

It is also, however, the intent of Congress that employees should participate, through unions of their own choosing, in decisions which affect them. The law strongly encourages employee participation in the establishment of performance standards affecting them. In this regard agencies are obligated to bargain on certain aspects of performance appraisal systems.

An agency's duty to bargain extends to:

- the form of employee participation in establishing performance standards;
- procedures which will be followed in the development and implementation of standards and elements;
- appropriate arrangements for employees who are adversely affected by the application of performance standards to them.

The right of an agency to identify critical elements and establish performance standards is also limited by the rights of an employee against whom disciplinary action has been taken based on the application of the standards. The employee may challenge this action under the appellate procedures of the Merit System Protection Board or under a negotiated grievance procedure.

An arbitrator, in ruling on a grievance alleging

(Continued on page 4)

PM 1.13:

Rest and Be Thankful

Casefacts: This case started when Local 3511, American Federation of Government Employees told the employer that *all* switchboard operators were entitled to two break periods. Switchboard operators at the Audie L. Murphy Memorial Veterans Medical Center in San Antonio, Texas worked three shifts. The practice was for day operators to receive two breaks, while operators on the 4 p.m.—12 a.m. shift and the 12 a.m.—8 a.m. shift often had no rest breaks.

The union raised the issue at an employee-management meeting. Management responded that during the day breaks were given because two operators were on duty. When only one person was on duty, 4 p.m. to midnight, "it would be impossible to provide breaks. During the midnight to 8 a.m. shift, the operator could take breaks at the work site and still maintain coverage of the board."

AFGE went to arbitration, basing its case on Article 8, Section 12 of the contract:

> "Employees in all services will be authorized two rest periods per eight hour tour of duty. These will be brief periods during which employees may interrupt their work to obtain refreshments or relief from fatigue or constant attending to duty. There may not be more than two such periods during any single eight hour period of duty and should be regulated to maintain adequate coverage of essential functions at all times."

The Center relied on Section 13 of the same article:

> "Any employee assigned to an eight and one-half hour shift will not be required to remain at his/her work station during lunch period... Employees whose tours of duty cover an eight hour period only and cannot normally leave their place of work will be allowed to eat at their work stations when time permits."

Two facts were undisputed. First, on certain occasions there was only one switchboard operator working from 4 p.m. to midnight and only one operator from midnight to 8 a.m. Second, the switchboard could not be left unattended under any circumstances because emergency calls came through the board.

The union's position was that the employer violated Section 12 by not allowing the operators to take a rest period on the evening and morning shifts. A former local president testified that the intent of Section 12 was to provide all employees with two rest periods during an eight hour shift, and no exceptions were written into the agreement. He added that Section 12 was a change from the prior agreement which made no provisions for all employees to have two rest periods.

AFGE declared that in trying to resolve the grievance it asked the Center to suggest a way for the operators to take a break, but the employer declined to make a suggestion. The union then suggested that administrative assistants relieve the operators, but management did not accept the recommendation.

The employer's position was that the operators were allowed their rest periods at the work sites, but did not have a contractual right to leave the immediate work area on a rest period.

A manager testified that some shifts had low traffic, specifically, the weekend shifts from 4 p.m. to midnight and from midnight to 6 a.m. Under those circumstances the operator had no relief. She could eat, drink, or use the rest room in the immediate area, but she had to be available to answer an audible alarm.

Issue: Is a switchboard operator assigned to an eight hour tour of duty without a relief operator entitled to two uninterrupted rest periods? If the answer is "yes," what will be the remedy?

Award: Arbitrator Edmund W. Schedler, Jr. ruled that the operators are entitled to two uninterrupted rest periods which include trips to the canteen, uninterrupted use of the rest rooms, and any other rest period privileges allowed other employees who work in the general area of the switchboard.

The arbitrator found without merit the employer's attempt to use Section 13 as an exception to Section 12. "The language of Section 13 clearly pertains to lunch periods," he said.

Arbitrator Schedler commented that "The unrefuted evidence was that employees were allowed to leave their immediate work area to use the rest room or go to the canteen... The switchboard operator was not allowed to leave her immediate work area; and her rest periods were subject to being interrupted by emergency calls.

"In my opinion, a rest period is not a rest period when it can be cut short by an early return to duty. The reason for a rest period is to allow an employee a few minutes for personal and private matters... If the operator was using the toilet when the emergency sounded, then she had to promptly respond to the alarm. If she had a mouthful of food when the emergency sounded, then she had to promptly swallow the food and answer the call. Clearly, it is not a rest period when the employee is never free from the responsibilities of her job." *(Audie L. Murphy Memorial Veterans Medical Center and American Federation of Government Employees Local 3511—May 12, 1980. LAIRS #12562)*

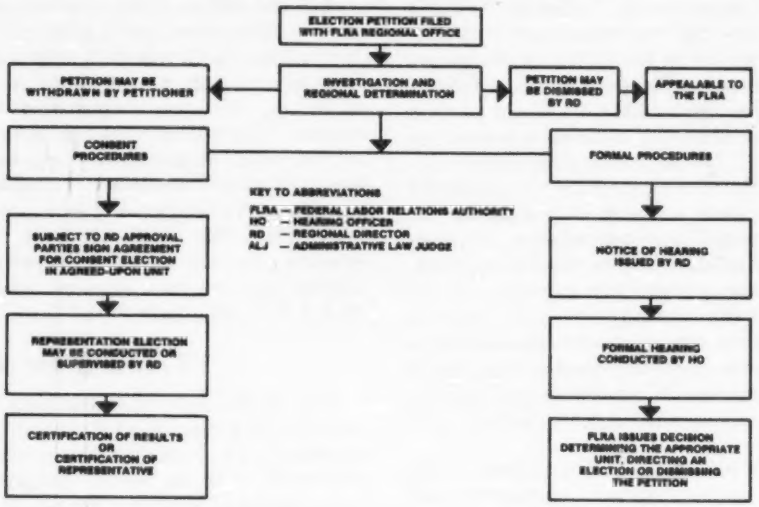
Representation Elections in the Federal Service

To become the exclusive representative of employees, a labor organization must receive the majority of votes cast in a secret ballot election. Election requirements are contained in section 7111 of the Federal Service Labor-Management Relations Statute.

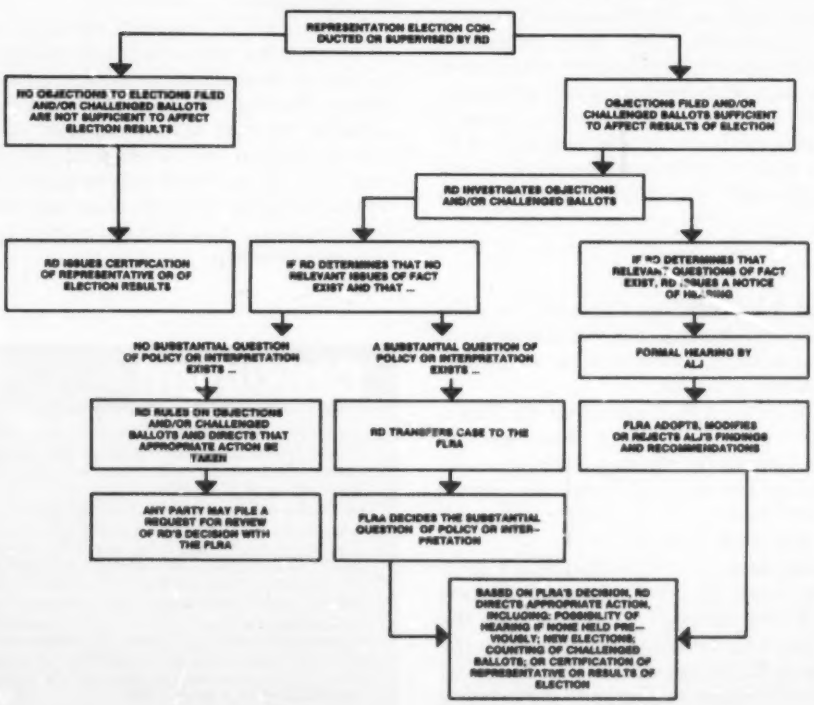
The two charts below illustrate pre-election and post-electon procedures. *These procedures apply to Certification of Representative, Representative Status and Decertification of Exclusive Representative cases.*

The charts originally appeared in the Comptroller General's report. "The Federal Labor Relations Authority: Its First Year in Operation."

BASIC PRE-ELECTION REPRESENTATION PROCEDURES


ELECTION PETITION FILED WITH FLRA REGIONAL OFFICE
PETITION MAY BE WITHDRAWN BY PETITIONER
INVESTIGATION AND REGIONAL DETERMINATION
PETITION MAY BE DISMISSED BY RD
APPEALABLE TO THE FLRA
CONSENT PROCEDURES
FORMAL PROCEDURES
KEY TO ABBREVIATIONS
FLRA — FEDERAL LABOR RELATIONS AUTHORITY
HO — HEARING OFFICER
RD — REGIONAL DIRECTOR
ALJ — ADMINISTRATIVE LAW JUDGE
SUBJECT TO RD APPROVAL, PARTIES SIGN AGREEMENT FOR CONSENT ELECTION IN AGREED-UPON UNIT
NOTICE OF HEARING ISSUED BY RD
REPRESENTATION ELECTION MAY BE CONDUCTED OR SUPERVISED BY RD
FORMAL HEARING CONDUCTED BY HO
CERTIFICATION OF RESULTS OR CERTIFICATION OF REPRESENTATIVE
FLRA ISSUES DECISION DETERMINING THE APPROPRIATE UNIT, DIRECTING AN ELECTION OR DISMISSING THE PETITION

BASIC POST-ELECTION REPRESENTATION PROCEDURES


REPRESENTATION ELECTION CONDUCTED OR SUPERVISED BY RD
NO OBJECTIONS TO ELECTIONS FILED AND/OR CHALLENGED BALLOTS ARE NOT SUFFICIENT TO AFFECT ELECTION RESULTS
OBJECTIONS FILED AND/OR CHALLENGED BALLOTS SUFFICIENT TO AFFECT RESULTS OF ELECTION
RD INVESTIGATES OBJECTIONS AND/OR CHALLENGED BALLOTS
RD ISSUES CERTIFICATION OF REPRESENTATIVE OR OF ELECTION RESULTS
IF RD DETERMINES THAT NO RELEVANT ISSUES OF FACT EXIST AND THAT ...
IF RD DETERMINES THAT RELEVANT QUESTIONS OF FACT EXIST, RD ISSUES A NOTICE OF HEARING
NO SUBSTANTIAL QUESTION OF POLICY OR INTERPRETATION EXISTS ...
A SUBSTANTIAL QUESTION OF POLICY OR INTERPRETATION EXISTS ...
FORMAL HEARING BY ALJ
RD RULES ON OBJECTIONS AND/OR CHALLENGED BALLOTS AND DIRECTS THAT APPROPRIATE ACTION BE TAKEN
RD TRANSFERS CASE TO THE FLRA
FLRA ADOPTS, MODIFIES OR REJECTS ALJ'S FINDINGS AND RECOMMENDATIONS
ANY PARTY MAY FILE A REQUEST FOR REVIEW OF RD'S DECISION WITH THE FLRA
FLRA DECIDES THE SUBSTANTIAL QUESTION OF POLICY OR INTERPRETATION
BASED ON FLRA'S DECISION, RD DIRECTS APPROPRIATE ACTION, INCLUDING: POSSIBILITY OF HEARING IF NONE HELD PREVIOUSLY; NEW ELECTIONS; COUNTING OF CHALLENGED BALLOTS; OR CERTIFICATION OF REPRESENTATIVE OR RESULTS OF ELECTION

(Continued from page 1)

improper application of a performance standard to an employee, may not substitute his or her judgment for that of the agency and set a new or different standard. The arbitrator is limited to determining whether the established standard complies with the law, regulations and applicable provisions of a negotiated agreement.

Second Decision Reinforces FLRA's Views

The other decision issued by the Authority, *3 FLRA 120—July 31, 1980*, involved the negotiability of a series of proposals presented to the Office of Personnel Management, as an employer, by the American Federation of Government Employees (AFGE), Local 12. One of the proposals required all performance standards to be "fair and equitable." The Authority found this criteria to be negotiable. In so doing, the FLRA emphasized that agencies have a duty to bargain insofar as the establishment of general, non-quantitative requirements by which the application of performance standards established by management can subsequently be reviewed. The Authority distinguished this from a proposal which imposes one particular standard or a proposal which would prevent management from establishing any performance standards and taking disciplinary action against employees based on such standards.

In ruling on other parts of AFGE's proposal, the Authority held that a union proposal is consistent with government-wide laws, rules or regulations if it is not incompatible or irreconcilable with them. All proposals must be read in light of applicable regulations, and interpreted in a manner which is consistent with these regulations if at all possible. Only those proposals which cannot be interpreted in any fashion which is in accord with existing regulations are outside the scope of bargaining. In the event that there is a dispute as to the interpretation of a proposal, it will be found to be negotiable if the union's stated interpretation of the proposal is not inconsistent with applicable laws, rules or regulations.

Unions Will Appeal

Reaction to the FLRA's decisions was swift. Dr. Alan K. Campbell, Director of the Office of Personnel Management, issued a statement saying that he was generally pleased with these decisions.

A press release issued by AFGE criticized the FLRA decisions. AFGE President Kenneth T. Blaylock said that these decisions "jeopardize the negotiability structure established under the act and dodge the critical issues we felt should have been urgently addressed." AFGE has filed a notice of appeal.

According to a statement by NTEU National Executive Vice-president and General Counsel Robert Tobias, that union also strongly disagrees with the FLRA's findings and will be filing an appeal in the near future. Mr. James Peirce, president of the National Federation of Federal Employees charged "We're being sacrificed on the FLRA's altar of management's almighty right to assign work" and vowed to seek court review on these issues.

The FLRA has not indicated when decisions on the remaining 14 cases involving performance appraisals and critical elements will be issued.

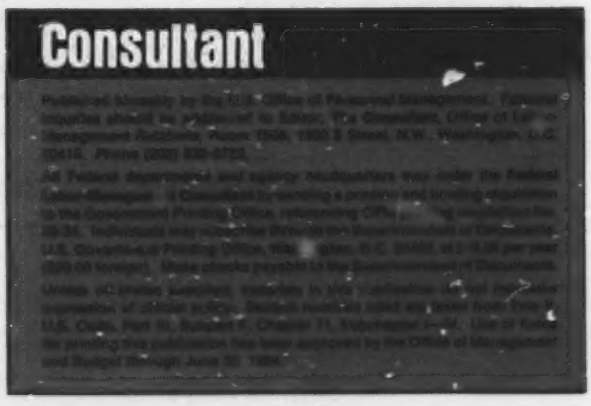
Time Marches On

AFGE filed a petition seeking to consolidate eight bargaining units represented by seven different locals within the Office of the Secretary of the Department of Health, Education and Welfare. A hearing was held on the petition on October 12, 1978 and briefs were filed by both parties. Subsequent to the hearing and the filing of briefs, the new Department of Education was created. The education-related functions of HEW and several other departments and agencies were transferred to the new department. Considering the foreseeable effects of this change on the structure of the former HEW (now the Department of Health and Human Services), as well as other factors, the Authority dismissed the union's request without prejudice. *(3 FLRA No. 125—July 31, 1980.)*

Training for All

The Authority has found that it is possible for a union to negotiate paid duty time for bargaining unit employees to attend union-sponsored training. In *3 FLRA No. 128*, an NTEU proposal presented to the Department of Interior, Bureau of Reclamation, Mid-Pacific Regional Office which allowed eight hours of paid duty time annually for such training was found to be negotiable.

Such training, however, must be made available to all bargaining unit employees on an equal basis. The Authority held that a provision in the same proposal which allowed an additional eight hours per year of training for each union member was not negotiable. This provision conflicted with the statutory requirement that an exclusive representative is responsible for representing the interests of all unit employees without discrimination and without regard to labor organization membership.



80-18
The Federal Labor-Management

Consultant

United States of America
Office of
Personnel Management
Route to:

1 FLMC 80—18

September 12, 1980

NEWARK PUBL
SEP 29 1980
DEPOSI

New Developments Checklist...

U.S. district court rules that Federal employees who strike cannot be rehired...p.1
Supervisory status based on definition of "employee"...p.1
Air Force found guilty of ULP at George AFB...p.1
Arbitrator directs FAA to reinstate grievant with back pay...p.1
Should employees receive overtime for changing into work clothes?...p.2
Authority's General Counsel reports progress in reducing backlog of cases...p.3
NTEU proposal for pre-paid parking held nonnegotiable...p.3
Panel issues order in DMA-AFGE impasse...p.3
Bookshelf...p.3
Federal Service Impasses Panel Tieline...p.4

No Reinstatement for Strikers

In a three-paragraph decision, a U.S. District Court in California has ruled that once an arbitrator has determined that an employee participated in a strike against the Federal government, no mitigation of the discharge penalty is possible. This case arose out of a July, 1978 job action at the U.S. Postal Service's Bulk Mail Center in Richmond, California. Following that action, Postal officials fired approximately 65 persons identified as "strikers." However, not all of the "strikers" ultimately lost their jobs since it could not be shown that they were all off work because of an intent to participate in a strike.

This case is unique. An arbitrator held that the grievant did participate in the strike—management had a photograph of the employee carrying a picket sign—but ordered that he be reinstated because of mitigating circumstances. The Postal Service refused to rehire the employee, and his union sued for an order enforcing the arbitration award.

The court refused to issue such an order because the statute deems it unlawful for a person who has participated in a strike against the government to hold a Federal job. An award of reinstatement for a declared striker would compel management to perform an illegal act. For this reason the award is unenforceable. The decision is now on appeal to the U.S. Court of Appeals, Ninth Circuit. All agencies, not just the Postal Service, will be affected by the outcome of this case.

When Is a Supervisor Not a Supervisor?

Local 1363 of the National Federation of Federal Employees won its contention that certain supervisors are members of the bargaining unit at the Eighth U.S. Army, Seoul, Korea. Since these supervisors oversee only aliens or noncitizens working outside the U.S. and armed services personnel, NFFE argued, they do not supervise employees within the meaning of the Federal Service Labor-Management Relations Statute. In a July 31 decision the Federal Labor Relations Authority accepted the union's reasoning. The Authority's ruling set aside the decision of its regional director to dismiss NFFE's petition.

The Authority found that supervisory status may not be established on the basis of the exercise of authority over individuals who are not "employees" as defined in section 7103(a)(2) of the act. The definition of employee excludes aliens or noncitizens who occupy positions outside the U.S. or members of the uniformed services.

The Authority granted NFFE's request for review of a regional director's decision on clarification of the unit. The case was remanded to the regional director for action in accord with the Authority's ruling. *(Case No. 8-CU-5—July 31, 1980)*

Air Force Commits ULP Against NFFE

Entirely adopting its administrative law judge's recommendations, the Federal Labor Relations Authority ruled that the Air Force committed an unfair labor practice by refusing to process a grievance under the negotiated grievance procedure. George AFB, California had based its refusal on the grounds that the negotiated procedure was no longer in effect since the contract with Local 977, National Federation of Federal Employees had expired. The ALJ, however, found that under settled law in the Federal sector, the grievance-arbitration procedure in an expired contract continues in effect. His recommendations relied heavily upon established precedent under former Executive Order 11491.

The Authority noted that existing personnel policies and practices affecting working conditions must continue when a labor agreement expires. The only exceptions would be when the parties expressly agree not to continue them, or when the policies and practices must be modified to conform to the Federal Service Labor-Management Relations Service.

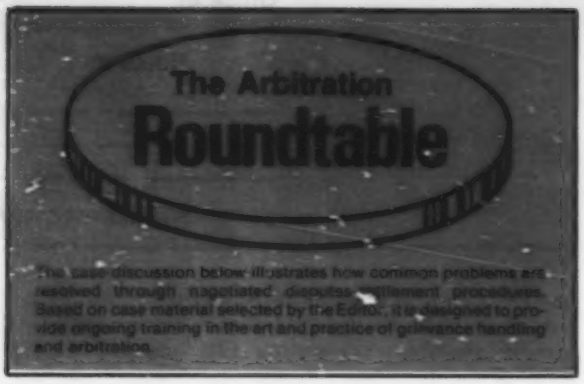
Its conclusion, the Authority said, would foster "desirable stability" in Federal labor-management relations. *(4 FLRA No. 5—August 12, 1980)*

Smoke Gets in Your Eyes

In the first arbitration award under the Civil Service Reform Act ordering reinstatement of an employee discharged for cause, Arbitrator Robert J. Corrigan directed the Federal Aviation Administration to reinstate the grievant with back pay. The grievant, an air traffic control specialist, was fired for alleged possession and use of marijuana on off-duty time. Noting

(Continued on page 4)

PM 1.13:


The Arbitration
Roundtable
The case discussion below illustrates how common problems are resolved through negotiated dispute settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

Suit Yourself

Casefacts: Workers at the fly production plant are part of the Screwworm Eradication Program, Department of Agriculture, in the Southwest U.S. The program aims at the elimination of this pest by producing and then irradiating screwworms to make the males sterile. Two million sterile flies are released each week.

Fly production is a continuous, seven day a week operation. Employees work the following shifts: 12 midnight to 8:30 a.m., 8 a.m. to 4:30 p.m. and 4 p.m. to 12:30 a.m. Oncoming employees relieve their predecessors on the hour, at eight, four and midnight. Workers completing their shifts are usually held in the work area for 10 minutes after the hour, before they can shower and change clothes.

Extreme care is taken to make sure no fertile screwworm leaves the plant. Only after taking a shower and discarding work clothes is the naked employee permitted to go through a door (unlocked by a guard), and on to the locker area where street clothes are stored.

Entry into the plant at the beginning of a shift reflects similar precautions. An employee must check valuables and remove all clothing before he is allowed through the locked door. He then dons work clothing, picks up his tools, and readies himself to relieve another employee.

In 1979 plant employees contended that changing to work clothes and street clothes was taking place on their time whereas it should be on government time. They wanted retroactive overtime pay at 6 percent interest for the last 10 years. Their representative, the American Federation of Government Employees Local 2588, filed a grievance.

Management agreed that the practice was for employees to change into work clothes prior to the start of their shift. The employer pointed out that this enabled workers to leave early, before their shift ended on the half hour.

Management and the union had discussed the procedure when the program began in the early sixties, and the employees then preferred the present system. If the employees no longer wanted to do it this way, management was willing to consider a change. But the employer cautioned that if the present procedure were changed, the shift reporting in would be arriving later, causing the outgoing shift to leave the duty area later.

Management contended that the union addressed only the time spent on changing into work clothes prior to beginning a shift, but conveniently ignored the employees' early departure from the plant. Management also charged that the union overestimated the time spent in clothes-changing. The employer produced time cards to show that employees did not work in excess of eight hours a day.

AFGE cited a Supreme Court ruling that activities preparatory to work are an integral part of a work assignment, and that waiting time, if required by the job, must be counted as hours worked. According to the union, changing clothes is part of the work assignment, and time spent waiting to relieve another employee is work time.

Disregard the time cards, AFGE argued, because the time clock and other clocks in the area vary widely. The employer rebutted that it checked the time clock twice a week.

Issues: The issues as posed by the union were: Are the affected employees required to change clothes prior to the beginning of their work shift? If so, are they entitled to retroactive pay?

The issues as posed by management were: Whether time spent prior to scheduled time is work? If so, is it compensable as overtime?

Award: The grievance was denied by Arbitrator A.Q. Sartain. "Regardless of any other aspects of this case, this grievance must be denied because of a lack of sufficient evidence to support the contention that the affected employees were, in fact, as a general rule in a work status for more than eight hours per day." The testimony of some witnesses indicated this, but other testimony put the assertion in genuine doubt, the arbitrator said. "Under these circumstances, since the union as grieving party has the burden of proof, its case must fail."

Arbitrator Sartain commented that the union had not provided hard evidence, particularly on the average time employees clocked in and out. "A number of other questions could be discussed in connection with the case," he said. The questions include whether clothes-changing time is work or merely action preparatory to it; what was the period for which recovery of unpaid wages might be made; and whether interest could be allowed.

The arbitrator noted that this decision did not resolve the complained-of situation. Yet since the present arrangement was entered into through collective bargaining between the parties, this process "is obviously available to them now for attempting to improve the situation. My observation of both the long experience and the obvious sincerity of each of the parties leads me to believe that efforts along this line have a good chance to lead to a satisfactory outcome." *(Agriculture, Veterinary Services, Screwworm Eradication Program and AFGE Local 2588—December 20, 1979, LAIRS 12266)*

Backlog of Cases Whittled Down by Office of General Counsel

FLRA's Office of the General Counsel reports that in the first six months of 1980 it made significant progress in eliminating the backlog of cases with which it was faced during 1979. In December 1979, a total 1,781 cases were pending in the regional offices. By the end of June 1980, the backlog was reduced to 1,245.

The General Counsel's Office accomplished this reduction even though new cases were coming in at an unprecedented rate. A total of 2,632 unfair labor practice cases and 316 representation cases were received from January through June—an increase of 28 percent over the previous six month period. Most of the increase was due to ULP cases.

The regional offices took dispositive action on 3,467 cases in the first two quarters of 1980. The median time for ULP cases (date of filing to dispositive action) was cut from four months to two and one-half months. Median time for representation cases is now 63 days, compared to the earlier 93 days. (These statistics are contained in the GC's report on case-handling developments for the second quarter of 1980.)

The General Counsel has set a 60 day interim time target for dispositive action on all cases by the regional offices.

IRS—NTEU in Car Wars

To the extent that the agency has discretion over pre-paid parking spaces for employee use, it must bargain over the proposal made by the National Treasury Employees Union that the parking spaces be retained. But to the extent that the proposal conflicts with GSA's government-wide regulations requiring Federal employees to pay parking fees, the proposal is not within the Internal Revenue Service New Orleans District's duty to bargain. This Solomon-like decision by the Federal Labor Relations Authority essentially holds that the NTEU proposal is nonnegotiable.

In its decision, *3 FLRA No. 118—July 30, 1980*, the Authority for the first time defined "government-wide regulations." In enacting the Federal sector labor law, "Congress intended the term 'government-wide regulations' to include those regulations and official declarations of policy which apply to the Federal civilian work force as a whole and are binding on the Federal agencies and officials to which they apply," the FLRA said.

The Authority pointed out that there are no regulations which literally affect every civilian employee of the Federal government. Consequently, the Authority declared, government-wide regulations mean regulations which are "generally applicable throughout the Federal government, i.e., apply to the Federal civilian work force *as a whole*, though not, of course, to every Federal employee. It is reasonable to conclude, therefore, that these [GSA] regulations are 'government-wide regulations' within the meaning of section 7117(a)" of the Federal Service Labor-Management Relations Act.

Panel Orders AFGE to Drop Proposal

The Federal Service Impasses Panel directed the American Federation of Government Employees to withdraw its proposal on a compressed workweek schedule for 950 nonprofessional employees. This order by the Panel resolved a bargaining dispute between AFGE Local 3407 and the Defense Mapping Agency's Hydrographic/Topographic Center in Washington, D.C. The employer had sought to retain the current flexitime program.

After considering the entire record, the Panel found that the current system had been working satisfactorily and there seemed no justification for changing it. Moreover, the Panel concluded that the adoption of the proposed compressed workweek schedule would prevent the employer from operating efficiently. *(Case Nos. 80 FSIP 12 and 17—August 17, 1980)*

The Office of Labor Management Relations, Office of Personnel Management, has just issued two reference publications which summarize third party case decisions in the Federal sector. These publications may be ordered from the National Technical Information Service, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161, telephone 703-557-4693.

- *Digest of Labor Arbitration Awards in the Federal Service, Supplement No. 6*, March 1980, purchase #PB80-209893, price $10.00 for paper copy and $3.50 for microfiche. This *Digest*, as well as earlier supplements, lists each award by subject matter, issue, date, parties and arbitrator.
- *Index of Federal Labor Relations Cases*, March 1980, purchase #PB80-202583, price $17.00 for paper copy and $3.50 for microfiche. The cumulative index contains arbitration awards, all rulings of the Federal Service Impasses Panel and the Federal Labor Relations Authority, and selected decisions of the Comptroller General and the former Federal Employees Appeals Authority. Case determinations of the Federal Labor Relations Council and the Assistant Secretary for Labor-Management Relations issued under Executive Order 11491 are also included. For the first time the *Index* lists relevant decisions of the Merit Systems Protection Board and the courts. All decisions are indexed by subject matter. This *Index* supercedes the October 1979 edition.

The Federal Service Impasses [illegible] TIE LINE

The Federal Service Impasses Panel has taken a number of actions to assist Federal agencies and their labor organizations in the resolution of bargaining impasses.

The Panel approved a binding arbitration procedure to resolve a deadlock on temporary promotion and the handling of classification errors—General Service Administration, National Archives and Records Service, Washington, D.C. and American Federation of Government Employees Local 2578 *(Case No. 80 FSIP 49, August 5, 1980).*

In two cases which had a threshold question concerning the employer's obligation to bargain, FSIP declined to assert jurisdiction:

- Department of the Air Force, 375 Air Base Group/CC, Scott AFB, Illinois and National Association of Government Employees Local R7-23 *(Case No. 80 FSIP 32, July 22, 1980).*
- Alaska Native Medical Center, Anchorage, Alaska and AFGE Local 3028 *(Case No. 80 FSIP 46, August 1, 1980).*

Because voluntary efforts to reach settlement had not been exhausted, the Panel directed the parties to resume negotiations with mediation assistance as necessary. The issues involved were:

- Rights of the union, hours of work, health and safety and others—Indiana Air National Guard, Hulman Field, Terre Haute, Indiana and AFGE Local 3098 *(Case No. 80 FSIP 39, July 8, 1980).*
- Wearing of the uniform—Minnesota Army National Guard, St. Paul, Minnesota and Association of Civilian Technicians Tony Kempenich Memorial Chapter *(Case No. 78 FSIP 99(a), July 29, 1980).* The Panel had declined to assert jurisdiction in an earlier case involving the same parties and issue.
- Timeliness as well as grievability and arbitratibility—Defense Nuclear Agency, Field Command, Kirtland AFB, New Mexico and AFGE Local 2263 *(Case No. 79 FSIP 121, July 30, 1980).*

A settlement was reached by the parties in two cases prior to action by the Panel:

- Department of the Army, Fort Polk, Louisiana and NAGE *(Case No. 80 FSIP 25, July 1, 1980).*
- Department of the Interior, Bureau of Land Management, Richfield, Utah and AFGE Local 3790 *(Case No. 79 FSIP 87(a), July 25, 1980).*

In two other cases the Panel granted the parties' requests for its assistance to be withdrawn:

- Department of the Treasury, Internal Revenue Service, Washington, D.C. and National Treasury Employees Union *(Case No. 80 FSIP 47, July 28, 1980).*
- Federal Energy Regulatory Commission, Washington, D.C. and AFGE Local 421 *(Case No. 79 FSIP 41(a), July 29, 1980).*

Final-offer selection was the procedure used by FSIP in three cases. The Panel ordered the adoption of the following proposals:

- Employer's proposal concerning the issues of merit promotion and temperature reductions—Naval Underwater Systems Center, Newport, Rhode Island and NAGE Local R1-144 *Case No. 80 FSIP 14, August 7, 1980).*
- Employer's proposal on a flexitime experiment—Naval Underwater Systems Center, Newport, Rhode Island and Tri-Union Negotiating Committee *(Case No. 80 FSIP 28, August 7, 1980).*
- Union's proposal on the issue of registering complaints with a third party—U.S. Army Health Services Command, Medical-Dental Department Activity, Fort Huachuca, Arizona and AFGE Local 1662 *(Case No. 80 FSIP 18, August 7, 1980).*

In the last case the Panel advised the parties that it would take whatever action it deemed appropriate to resolve the dispute following the receipt of their written submissions. The Panel subsequently ordered them to adopt the employer's proposal regarding the use of written tests and an interview panel for in-service placement actions—Air Force Systems Command, Space Division, Los Angeles, California and AFGE Local 2429 *(Case No. 80 FSIP 11, August 7, 1980).*

(Continued from page 1)

that the FAA-Professional Air Traffic Controllers Organization contract requires adverse actions to be supported by a preponderance of evidence, Arbitrator Corrigan ruled that the agency had not met this standard of proof.

The arbitrator said, "The definition of preponderance of evidence used by the Merit Systems Protection Board is 'that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.' Such a definition is generally acceptable except that this arbitrator feels that the evidence should be *clearly* sufficient to support a conclusion that the matter asserted is most *probably true rather than false.*" Accordingly he found that while there was a significant basis for FAA's suspicion, it had not been clearly proven.

As to the relationship between off-duty conduct and disciplinary action, the arbitrator judged, the contract authorizes discipline if such conduct hampers an employee's effectiveness or affects the public's confidence in the FAA. In addition, the right of FAA to take disciplinary action for off-duty use of marijuana by air traffic controllers has been upheld by the courts.

"If the agency had established by the relevant standard of proof that the grievant was guilty of the charges against him, then severe disciplinary action would have been warranted," said Arbitrator Corrigan. "It has not done so, and it is found that just cause did not exist for removal." *(LAIRS 12712—July 29, 1980)*

Consultant

[illegible]

The Federal Labor-Management

Consultant

LRRC 80—19

September 26, 1980

Office of Personnel Management
Route to:

New Developments Checklist...

New GAO rules authorize advisory opinions to neutrals on appropriated fund expenditures...p.1

Group demonstration by SSA employees at Flatbush office ruled a work stoppage...p.1

Grisly problems of beards is issue before arbitrator at Utah National Guard...p.2

Arbitration award partially overturned in Dependents Schools-DEA case...p.3

Authority upholds ULP charges by International Plate Printers Union against Bureau of Engraving and Printing...p.3

ACT's proposal to Pennsylvania National Guard is within management's duty to bargain...p.4

FLRA rules negotiable a car registration proposal by NFFE for Army employees in Korea...p.4

New GAO Rules Allow Neutrals to Request Advisory Opinions

New regulations of the General Accounting Office amend procedures governing requests for its decision on appropriated fund expenditures. Neutrals, such as arbitrators and the Federal Labor Relations Authority, may now request advisory opinions from the Comptroller General on whether monetary awards in arbitration and unfair labor practice cases can be paid legally from government funds.

The new procedures also reflect GAO's intent that deference be given to the arbitration process and to decisions made by the Authority. The revised rules, GAO says, were needed for implementation of the labor relations program under Chapter 71 of the Civil Service Reform Act of 1978.

As in the previous rules, unions, heads of agencies, and disbursing and certifying officers have a right to request a decision on payments made from appropriated funds. However,when making a request they must notify GAO whether the matter is subject to a negotiated grievance procedure, if a grievance has been filed, and if the matter is before the Authority, another administrative body, or the courts. A copy of the request must be given to the parties.

Arbitrators and other neutral administrative bodies "may request an advisory opinion on any matter involving the expenditure of apppropriated funds which is of mutual concern to Federal agencies and labor organizations." The neutrals have the option to give copies of their request to interested parties, and the parties have 20 days to file written comments with the GAO. GAO retains the discretion to decline to issue an advisory opinion,but normally its opinion will be given within 60 days after the close of the comment period.

Guidelines

The rules provide guidance as to when GAO will, as a matter of policy, defer to procedures established pursuant to Chapter 71.

The CG will not review or comment on the merits of an arbitratrion award which is final and binding pursuant to the act. Payments made under arbitration awards do not set a precedent for payment in similar situations not covered by the award.

GAO adds that it would be inappropriate for it to respond to requests from either management or unions to review matters subject to the negotiated grievance procedure if the other party objects. GAO will respond to requests from certifying and disbursing officers because these officers have a statutory right to refuse to issue a voucher.

The CG will not issue a decision on matters that the CG finds more properly within the jurisdiction of the Authority or other administrative body or court.

The final rules appeared in the *Federal Register* of August 21, 1980 as 4 CFR Part 21.

Employee Demonstration at SSA Ruled Work Stoppage and ULP

On the afternoon of May 25, 1978, 60 employees of the Social Security Administration's Flatbush, New York District Office left their work stations and gathered before the director's office to protest and orally grieve the poor physical conditions and maintenance of their office. Their action stemmed from a union meeting that morning, and it was led by two union representatives of the New York-New Jersey Council Local 3369, AFGE. The entire incident lasted from three to six minutes. Management called it a work stoppage and violation of Executive Order 11491. The Federal Labor Relations Authority upheld SSA's unfair labor practice charge.

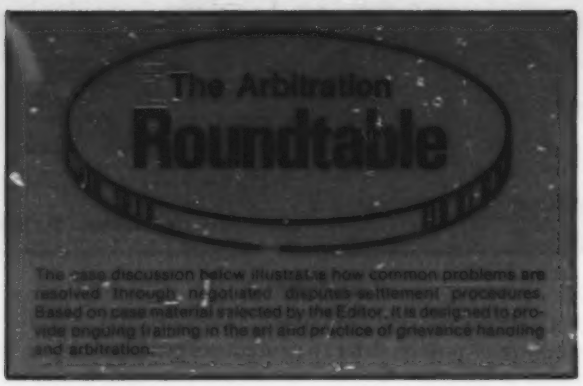
In its decision and order, the Authority noted the Administrative Law Judge's conclusion that "the confrontation with complainant by the employees and their union leaders was a work stoppage within the contemplation of section 19 (b) (4) of the Order, rather than the presenting of a grievance."

The facts showed that physical conditions at the office were bad as well as somewhat hazardous. The district office manager wrote more than 40 letters of complaint to SSA and the General Services Administration.

Nevertheless, the ALJ said, the parties' contract contained specific steps for presenting a grievance, and none of the procedures encompassed the actions re-

(Continued on page 4)

PM 1.13:



The case discussion below illustrates how common problems are resolved through negotiated disputes settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

A Hunting We Will Go

Casefacts: As deer hunting season rolled around, a maintenance mechanic at the Utah Army National Guard began to grow a beard. Beard-growing, believed to provide some warmth while hunting, was part of a community tradition.

A few weeks later the mechanic's supervisor told him to shave off the beard and warned other shop employees against growing one. Local 1724 of the National Federation of Federal Employees filed a grievance.

All the employees affected by this arbitration were technicians in the excepted service. As such, they were required to belong to the National Guard, were subject to military requirements, and were obliged to attend military drill one weekend a month.

The case hinged on a beard-growing practice claimed by the union, and and anti-beard-growing policy claimed by the employer. The claimed practice was limited to the deer hunting season running from August to November (archery to rifle hunting).

NFFE pointed to a contract clause requiring management to negotiate with the union prior to implementing a new personnel policy which affects working conditions.

Union witnesses testified that they had worn beards during deer season for five or six years, and that during one season a majority of employees in their shop had beards. One witness had observed beard-growing technicians in several other shops.

Management witnesses did not directly rebut these statements, but neither did they affirm them. When asked if he had knowledge of a beard-growing contest at another Guard location, a supervisor responded that he had heard about it but had no first-hand knowledge.

Management quoted an Army regulation, applicable to National Guard members, that "Goatees and beards are not authorized." The management witnesses indicated that beard-growing was permitted in special situations, such as a facial infection.

Both Army rules and the parties' contract call for technicians to comply with grooming standards, the employer said. Further, the agreement states that Utah Guard officials and employees are governed by published Army policies, including the proscription against beards.

A management memo to supervisors was introduced as evidence. Dated a month after the grievance was filed, the memo instructed supervisors to make sure that technician employees complied with military standards, especially the wearing of beards. "Without management concurrence," the memo said, "supervisors have in the past permitted, for personal convenience, departure from military grooming standards."

The obvious question in seeking to accommodate the two lines of testimony was how employees could grow beards during deer hunting season and still appear at drills clean-shaven. Upon cross-examination, a union witness said that when he had a beard, he "ET'd" drill. (ET stands for equivalent training. When an individual is excused from drill, he has to make it up by taking equivalent training at another time.)

Testimony at the arbitration hearing also covered what happened during negotiations, Federal Labor Relations Authority's statements on compelling need, and civilian attire vs. military uniforms.

Issue: Was there a practice whereby employees were permitted to grow beards during deer hunting season? If such a practice existed, what remedy is appropriate?

Award: Arbitrator Ronald L. Wiggins found that there had existed a past practice which permitted employees to grow beards during deer hunting season. He directed the employer to negotiate with NFFE "to alleviate the impact on employees of the discontinuance of the practice, which discontinuation is pursuant to an Army regulation."

The arbitrator's conclusion was based on the testimony and the record. "ETing" when a beard was being grown suggested to him that supervisors facilitated beard-growing by employees during the hunting season. Management's memo to supervisors after the grievance was filed indicated a past practice which management intended to terminate.

In private sector labor relations, Arbitrator Wiggins observed, past practice has the same force and effect as a written contract provision. In the Federal sector the effect may be different because employee relationships are governed by higher agency policies as well as by the contract.

In this case, he said, Army regulations prohibit beards, and the contract says these regulations are not subject to arbitration. Consequently, he could not direct the union's requested remedy of restoration of the beard-growing-during-deer-season practice.

Nevertheless, the arbitrator continued, there is a finding of past practice, and the employer should have negotiated with the union prior to making a change.

Arbitrator Wiggins commented that while the testimony on bargaining history, Federal Labor Relations Authority's interpretation of compelling need, etc., was important for enactment of the agreement, it was not relevant to the narrow issue of a claimed practice. *(Utah Army National Guard and National Federation of Federal Employees Local 1724—March 21, 1980. LAIRS #12482)*

FLRA Overturns Arbitration Award

In ruling on a petition filed by the Defence Department's Office of Dependents Schools, the Authority partially overturned the arbitration award of Arbitrator Nicholas H. Zumas. The disputed part of the award would have granted leave to the president of the Overseas Education Association without loss of pay or charge to leave. This remedy, said the Authority, "fails to draw its essence from the parties' agreement."

The OEA represents 6,500 teachers employed by Dependents Schools in the European, Pacific and Atlantic regions. To enable the union to represent employees in the widely dispersed bargaining unit, the contract grants 90 days of paid "release time" annually to the Association president. In addition, the president has "the option of taking leave without pay (LWOP) for any remaining portion of the school year."

The president decided to assume full-time status as a union official, begnning January 1979. He presented management with schedules in which he would alternate LWOP time with release time for the balance of the school year. The activity turned down the schedules, asserting that the contract requires the president to take the full 90 days release time before being allowed to take any LWOP.

When OEA grieved management's action, Arbitrator Zumas found nothing in the contract to suggest that the 90 days must be exhausted before LWOP could be taken, thus sustaining the union's grievance.

His arbitration award was in four parts, and the employer objected to parts 2 and 3. Under part 2, the LWOP days denied by management were to be changed to "excused from duty without loss of pay and without charge to leave" and not counted as release time. In the relevant portion of part 3, five specific days in April concerning the president's status as "participant/witness" in this case were to be considered as duty days.

The activity alleged that parts 2 and 3 of the award failed to draw their essence from the negotiated agreement. Further, these sections not only exceeded the arbitrator's authority, they violated law and regulation by being punitive in nature.

The Authority agreed with the activity that part 2 failed to meet the "essence" standard. FLRA determined that the contract provides only two options regarding pay status for the conduct of labor-management business by the union president: LWOP or release time. Yet the arbitrator "disregarded the terms of the agreement and fashioned a third type of pay status for which there is no rational basis in the agreement." The Authority accordingly overturned part 2 of the award. This judgement made it unnecessary for FLRA to address the employer's allegation that part 2 exceeded the arbitrator's authority or was punitive in nature.

The Authority dismissed management's charges regarding part 3, and upheld this section of the award. The awarding of five duty days as "participant/witness" time for the grievant was based on a contract clause providing teachers and OEA representatives with official time for grievance preparation and presentation, the Authority said. Moreover, the record did not demonstrate that part 3 exceeded the arbitrator's authority or directed the payment of illegal compensation. *(4 FLRA No. 17—August 29, 1980)*

ULP Charges Against Bureau of Engraving

The Federal Labor Relations Authority found that Treasury's Bureau of Engraving and Printing in Washington D.C. committed an unfair labor practice by refusing to bargain with the union on the working conditions of 25 supervisory trainees while performing bargaining unit duties. The Authority disagreed with its Administrative Law Judge's conclusion that the assistant foreman trainees should be excluded from the bargaining unit solely on the basis of their status as supervisory trainees. The unfair labor practice charges were brought by Local 2 of the International Plate Printers Union.

The Authority adopted its ALJ's finding that assistant foremen are supervisors within the meaning of section 2(c) of Executive Order 11491. In this particular case, however, the trainees spent less than half of their time serving as acting assistant foremen, and the rest of their time as plate printers. Under the circumstances, said FLRA, it would be unjustified to exclude them from the unit solely because of their supervisory training status and regardless of their actual performance of supervisory duties. Moreover, their pay and fringe benefits remained the same both during and upon completion of their training, except for the periods they served in an acting assistant foreman capacity.

The Authority dismissed two other unfair practice allegations made by Local 2 against the Bureau. One charge was that the activity conducted a formal discussion without providing the union an opportunity to be present. Here the Authority found that the meeeting was limited to training orientation, and did not constitute a formal discussion which required union representation.

Local 2's charge that the activity attempted to undermine the union and to deny union representation to unit employees was dismissed for insufficient evidence.

FLRA said its decision was made solely on the basis of the Executive Order and as if the new Federal Service Labor-Management Relations Statute had not been enacted. *(4 FLRA No. 6—August 12, 1980)*

(Continued from page 1)

sorted to by the employees.

AFGE claimed that its representatives did not lead a work stoppage, but merely attempted to bring to management's attention the extremely bad physical conditions. Even if there were a strike,the stoppage was *de minimus* and the complaint should be dismissed.

The ALJ was not persuaded by the union's arguments. There was no doubt in his mind that the union sponsored and led the employees in their activity. The action was taken to protest and grieve employment conditions and to bring pressure to bear upon management. Given the circumstances, the employees' action constituted a work stoppage.

While the stoppage was of brief duration, the ALJ said, a stoppage of 60 employees in the presence of members of the public is more than a brief interruption. It is also a show of force and not a minor occurence. It is not a *de minimus* action.

Finding that AFGE was guilty of an unfair labor practice, the Authority ordered the union to cease and desist from encouraging or engaging in a work stoppage. It told the union to stop condoning this type of activity by its failure to take affirmative action to prevent or stop it. *(4 FLRA No. 22—August 29, 1980)*

ACT's Proposal Is Held Negotiable

In an August 25 decision the Authority ruled negotiable a bargaining proposal made by the Association of Civilian Technicians to the Pennsylvania National Guard. The union's proposal defined the areas of consideration from which candidates for excepted positions would be selected: initially limited to bargaining unit employees and then to progressively wider areas.

The activity presented a three-part argument, claiming that ACT's proposal established a mandatory rank order preference for selection. First, the proposal violated management's reserved right to select "from among properly ranked and certified candidates for promotion or any other appropriate source," under section 7106 (a) (2) of the Civil Service Reform Act of 1978. Second, it violated merit system principles of recruitment under section 2301. And third, it was inconsistent with the Revised Merit Promotion Policy in FPM Letter 335-12.

The Authority was not persuaded that the provisions cited by the Guard stood as a bar to negotiations. The FLRA pointed to its earlier decisions in similar cases *(3 FLRA No. 9 and 2 FLRA No. 59)*, that the proposals require only that *consideration* be given to employees in the bargaining unit. The proposals did not prevent management from exercising its reserved right to select.

As to merit principles, a Congressional committee report on the act specifically stated that "Unless a law, rule or requlation implementing or directly concerning the principles is violated,... the principles themselves may not be made the basis of a legal action by an employee or an agency." The FLRA judged that nothing in the proposal or its implementation would violate a law or rule.

Futhermore, the Authority said, the FPM provisions relied on by the Guard apply only to the competitive service, whereas ACT's proposal expressly applies only to positions in the excepted service. *(4 FLRA No. 10—August 25, 1980)*

In My Merry Oldsmobile

Should bargaining unit employees at the U.S. Army Garrison, Yongsan, Korea not be required to register their privately owned vehicles (POVs) in accordance with Army regulations? That was the bargaining proposal made by the National Federation of Federal Employees Local 1363. When the Army called the petition nonnegotiable, Local 1363 petitioned the Federal Labor Relations Authority for a ruling—and won its case. The Authority ruled that the union's proposal was within the scope of management's duty to bargain.

The activity had argued that rather than being a bargainable condition of employment, POV registration was related to the employees' residency in Korea.

Under Army regulations, possession of a duty free vehicle is a privilege contingent upon employment by the agency. POV registration is cancelled when, for example, an employee's "tour" is completed or his/her contract ends. Failure to comply with the registration policy will bring sanctions by the employer against the delinquent employee.

Accordingly, said the Authority, the policy is enforceable solely because of employment. It is a personnel policy established by the Army which affects both the working conditions of bargaining unit employees and the employment relationship.

For these reasons the Authority determined that the proposal concerns a condition of employment within the meaning of section 7103 (a) (14) of the Federal Service Labor-Management Relations Statute. *(4 FLRA No. 8—August 25, 1980)*

The Federal Labor-Management

Consultant

1 FLMC 80-20

October 10, 1980

United States Office of Personnel Management
Route to:
OCT 27 1980

New Developments Checklist...

Five MSPB decisions offer guidance on payment of attorney fees...p.1

Repayment of union dues comes before Federal court and Comptroller General...p.1

Agriculture's refusal to allow meat inspector to buy from packing plant reaches arbitration...p.2

FSIP issues first annual report under CSRA...p.3

FLRA asks Chicago court to enjoin HUD from detailing employees...p.4

Army must bargain on AFGE demand for official time for bargaining preparation...p.4

MSPB Rules on Attorney Fee Awards

The Merit System Protection Board recently issued five decisions involving attorney fee awards. These decisions, taken together, offer guidance as to when the Board may order agencies to pay attorney fees of employees winning appeals. The rulings have significant implications for Federal labor-management relations, particularly arbitration awards.

When Fees May Be Authorized

The Civil Service Reform Act, 5 U.S.C. 7701, authorizes MSPB to award payment of reasonable attorney fees when an employee prevails in an appeal and the award is "within the interests of justice." The Board, noting that Congress did not intend fees to be granted in every case, held that it has broad discretion in making such awards.

Examples of when a fee award might be appropriate, said the Board, are when agencies engage in a prohibited personnel practice, take an action clearly without merit, act in bad faith, commit a gross procedural error, and know or should have known that the case could not prevail on the merits. (This means that an agency's failure to conduct a thorough investigation and present an effective case might be judged evidence of ill will or negligence—making it liable for payment of fees.) In all cases, appellants have the burden of proving that they are entitled to fees.

Attorney-Client Relationship Must Exist

The Board ruled that even when the employee is not directly charged for legal services, a fee award is permitted. There must, however, be an attorney-client relationship, and the fees must be *incurred* on behalf of the employee. This would apply to a union attorney representing an employee.

Cases Must Fall Within MSPB's Jurisdiction

Fees can be paid only in cases falling within the Board's appellate jurisdiction. Payment is barred in cases brought by the MSPB Special Counsel or cases involving a Board challenge to OPM regulations (5 U.S.C. 5596), if the employee incurs no legal expenses. An exception could be made, however, if management action resulted in a pay loss to the employee.

How the Board Calculates Fees

The fee award must be a reasonable one, the Board held. In most cases the award would be calculated by multiplying the lawyer's billing rate times hours worked.

Potential Impact on Labor-Management Relations

The MPSB rulings can be used as guidelines by arbitrators ordering an attorney fee award as part of a make-whole remedy. The rulings also apply if a union attorney represents employees before the MSPB or helps in the preparation of a case brought by the Special Counsel.

The MSPB cases cited are *Allen v. U.S. Postal Service, AT075299011; Kling v. Department of Justice, AT075299048; Frazier, et al., v. Hall, et. al., SC-79-3; O'Donnell v. Department of Interior, NY075299058; Wells v. Harris, HQ12050017.*

Court and CG Focus On Recoupment of Union Dues

Recoupment of union dues was the subject in recent decisions by a Federal court and the Comptroller General. The court refused to issue an injunction sought by a labor union, and in two decisions the CG ruled against repayment to members for dues paid through payroll deduction.

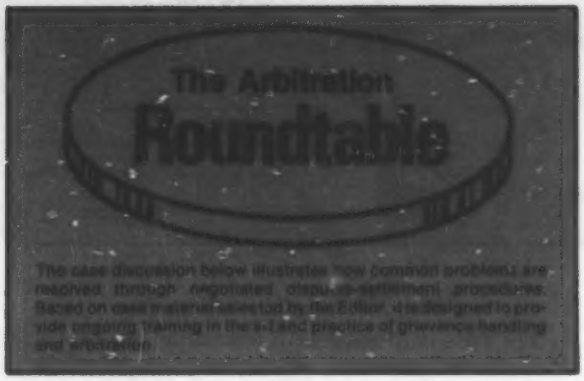
The U.S. District Court for the Northern District of New York held that complaints arguably within the scope of Federal sector labor law should go to the Federal Labor Relations Authority. Even though the complaint claimed that constitutional rights were violated, the court ruled that it must defer to the exclusive competence of the Authority. District Judge Neal P. McCurn accordingly told the American Federation of Government Employees to take its unfair labor practice charge against the Air Force to the Authority. His ruling was based on a court decision in private sector labor relations, *Buckley v. American Federation of Television Artists, 496 F. 2d 305 (1974).*

The case started when Griffiss AFB, Rome, New York mistakenly withheld $2,884 in dues from the pay of 37 union members no longer in the bargaining unit, and turned the money over to AFGE. Although the employees were not eligible for checkoff, they still belonged to the local.

Griffiss asked the union to repay the money so that the activity could redistribute it to the 37 members. When AFGE refused, the activity announced that the amount claimed would be deducted from dues withheld in the future. AFGE then sought a temporary restraining order to prevent Griffiss from recouping the money. *(William J. Clark, et. al., vs. Hans Mark,*

(Continued on page 4)

PM 1.13:



The case discussion below illustrates how common problems are resolved through negotiated dispute-settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

The Best or the Wurst Decision

Casefacts: The Department of Agriculture's regulations prohibit employees from purchasing products at firms which they inspect or regulate unless they have supervisory permission.

Five criteria must be met before permission is granted: proximity of other outlets; number of retail outlets in the commuting area; whether the outlet is a sole source; whether the item or service is being sold at the prevailing price; and whether the outlet is open to the general public. The crtieria are reprinted in the labor agreement between the Food Safety and Quality Service (FSQS) and the National Joint Council of Food Inspection Locals, American Federation of Government Employees.

An Inspector at FSQS, familiar with the regulations, sought an OK to buy meat at the Blank Packing Company. This is a wholesale meat packer which sells retail two afternoons and one morning a week. The retail meat, including sausage, is factory seconds. Although of good quality, it has slight production blemishes and cannot be sold to the company's regular accounts. A retail customer can purchase first quality products as well as seconds.

When the inspector's request was turned down, he filed a grievance and AFGE took the case to arbitration.

At the arbitration hearing, the grievant insisted that his request met the criteria. (1) The packing company is the closest retail outlet to his home. (2) No other stores in his area sell this type of product. (3) The plant is the only one which produces an ethnic sausage and no-water-added pork products. Because the products are seconds, there is a considerable cash savings. (4) The firm posts prices, and everyone, general public and FSQS employees, pays the same. (5) The outlet is open to the general public three times a week.

AFGE claimed that under the regulations the grievant had not even needed permission to buy at Blank Packing, and the agency was expanding the intent of the regulations. There was no conflict of interest or appearance of conflict in the grievant's situation. He met the criteria and should have been granted permission.

The employer took the position that management followed the regulations, but the inspector did not meet the criteria.

The contract, said the employer, calls for "unusually high standards of honesty, integrity, impartiality and conduct by inspectional employees" as essential to retain public confidence in Service operations. Moreover, agency regulations direct employees to avoid actions which might result in, or create the appearance of, using public office for private gain.

Under the contract, high level regulations are the sole requirements applied to bargaining unit employees with respect "to conduct and responsibility."

FSQS pointed out that while the grievant was never regularly assigned to inspect the plant, he had taken temperature readings there three times in the past year.

Management asserted that the grievant failed to meet the first three criteria. There were other area retail stores where the grievant could obtain the same products, possibly at a small difference in price. Further, the Blank retail activities were in a room used during non-retail hours for wholesale purposes.

Issue: Did FSQS act properly and appropriately under existing agency regulations covering bargaining unit employees in denying the grievant's request to purchase products for the Blank Packing Company's retail outlet?

Award: Arbitrator William B. Post denied the grievance, ruling that the employer acted properly in refusing to grant the inspector's request.

It is apparent, Arbitrator Post said, that every effort is to be made to avoid any act which might create even the appearance of improper conduct.

The Blank retail store is not a retail outlet in the usual sense of the word. It is open to the public on a limited schedule and run by plant managers who also conduct wholesale operations. These are the same management personnel with whom an inspector would be in contact when performing his duties. They knew him as a government inspector who had some responsibilities, even on an irregular basis. The situation might well arise when the grievant would check meat temperatures in the plant on a Saturday, and then go the area of the plant where products are sold at retail and make purchases of meat.

"It could be argued," the arbitrator noted, "that management would be tempted to give him favorable treatment. It is clear that even if there was no conflict of interest, there would be the appearance of conflict of interest if an agency inspector performed an inspection function, and then made a retail purchase in another area of the same plant."

Arbitrator Post accordingly found that FSQS interpreted its regulations in a reasonable way, to achieve their stated intent—to avoid even the appearance of a conflict of interest. *(Agriculture, Food Safety and Quality Service and National Joint Council of Food Inspection Locals, AFGE—April 15, 1980. LAIRS 12556)*

Impasses Panel Report for 1979

Almost 10 years ago the Federal Service Impasses Panel began operations under Executive Order 11491. The Civil Service Reform Act made FSIP an entity within the Federal Labor Relations Authority, but its function—assisting the resolution of negotiation impasses—remains unchanged.

The law allows either party to an impasse to request Panel services if voluntary arrangements, including assistance by the Federal Mediation and Conciliation Service, are not successful. The parties may also ask FSIP to approve procedures for outside, binding arbitration.

Reporting on the first nine months under the act, the Panel pointed to a 13 percent increase in requests for its assistance. This same period, January 1—September 30, 1979, saw the use of more diverse settlement techniques and a decline in the need for the Panel to make formal recommendations and decisions to resolve disputes.

During 1979 the Panel had 27 carryover cases and 93 new request, primarily from labor organizations. By September 30, 76 cases were closed.

Disposition of Closed Cases By Type and Calendar Year

Type of Disposition	1970-77	1978	1979 (As of 9/30)	Total
Withdrawn	117	54	33	204
Jurisdiction Declined	64	21	18	103
Settled Prior to Panel Report and Recommendations	67	22	11	100
Settled After Panel Report and Recommendations	31	9	3	43
Decision and Order Issued	8	19	10	37
Use of Third-Party Arbitration Authorized	0	2	0	2
Use of Third Party Arbitration Not Authorized	0	1*	1	2
Total Closed	287	128	76	491

*The Panel held that the parties could use outside arbitration without authorization from the Panel.

The 33 requests for the Panel to withdraw its assistance exceeded all other reasons for case closings. Typically, the withdrawal requests came early in the Panel's procedures as the parties resumed bargaining with guidance from the Panel and the Federal Mediation and Conciliation Service. Other withdrawal requests were made because unfair labor practice charges had been filed or negotiability issues raised.

In 18 cases the Panel declined to assert jurisdiction. FSIP usually declined because the parties failed to exhaust bargaining efforts. In a few situations, however, there was a threshold question concerning the duty of the parties to bargain.

The Panel used a number of different approaches in resolving negotiation impasses over which it asserted jurisdiction. Its usual approach was the direction of disputes to factfinding followed by Panel recommendtions (although most of these disputes were resolved at the prehearing conference). Eleven cases were settled prior to Panel recommendations, and three after the recommendations. Show cause orders and written submissions were methods used by Panel in 10 cases. And in one case FSIP refused to authorize the use of binding arbitration.

The most frequent issues were: facilities and services (office space, parking, etc.), grievance and arbitration procedures, hours of work and tours of duty, official time, promotions, and wearing of the military uniform.

On the employer side, the Army and Air National Guard, Navy, Army, and Treasury Department were most frequently involved in Panel proceedings. On the union side, the American Federation of Government Employees continued to be the heaviest user of Panel services.

Participants in Panel Proceedings

Employer	CALENDAR YEAR RECEIVED 1970-77	1978	1979 (As of 9/30)	Total
Army/Air National Guard	42	21	14	77
Navy	49	19	14	82
Treasury	17	15	9	41
Army	36	6	9	51
HEW	19	7	8	34
Air Force	36	5	4	45
GSA	18	5	2	25
Transportation	25	1	1	27
Others	89	28	34	151
Total	331	107	95	533
Union				
AFGE	190	39	49	278
NFFE	28	21	10	59
NTEU	15	13	9	37
NAGE	19	12	8	39
ACT	12	5	3	20
Metal Trades Council	14	2	2	18
Others	53	15	14	82
Total	331	107	95	533

The above summary is from the *First Annual Report of the Federal Labor Relations Authority and the Federal Service Impasses Panel* for the fiscal period January 1—September 30, 1979. The report is for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

The Authority and the General Counsel's report will be summarized in a future issue of the CONSULTANT.

(Continued from page 1)

Secretary of the Air Force: USDC ND NY, No. 79-CY-777, August 27, 1980)

Employees Lose Bid to Recoup Dues

The Federal government is not required to reimburse the 71 employees at Fort Stewart/Hunter Army Airfield whose union dues were improperly withheld, the Comptroller General ruled. Although the activity erred by not halting checkoff when the employees left the bargaining unit, the employees had a responsibility to notify the employer to discontinue their dues allocation. In addition, the CG held, "Employees are not entitled to reimbursement for allotment payments which inure to their benefit... Since we have determined that the Government is not required to reimburse the employees, there is no need to recoup the money from the union."

The decision noted that "in view of the difficulties which such reimbursements cause, they should not be made unless an individual case presents facts which would justify such action." *(Comptroller General Decision B-180095, September 8, 1980)*

Checkoff Irrevocable for One Year

Another CG decision determined that an authorization for checkoff cannot be cancelled even though the employee asked for its revocation before deductions began. "Under the Civil Service Reform Act, 5 U.S.C. 7115(a), an agency must honor a written authorization for allotment of union dues when it is received, and the employee may not have the union dues returned to her," the CG said. He cited the statutory mandate that a dues assignment cannot be revoked for one year unless the labor agreement ceases to be applicable to the employee, or the union suspends or expels the employee.

In this case, an Army payroll department received a signed authorization for checkoff from the employee. The form provided that the allotment became effective the first full pay period following its receipt in payroll. A week later, before the dues were deducted, the employee changed her mind and asked that the allotment not be processed. Payroll complied with her request.

When the American Federation of Government Employees found out what had happened, it filed a grievance. The activity and the union settled in favor of the union, and the employee's checkoff went into effect. She wanted the checkoff cancelled and her dues refunded.

The CG held that she may not be refunded any money properly allotted to the union. *(Comptroller General Decision B-196978, August 14, 1980)*

FLRA Seeks Injunction to Halt Detail; Parties Settle Prior to Court Hearing

On August 25 the Federal Labor Relations Authority petitioned the U.S. District Court in Chicago for a preliminary injunction to halt the Housing Department's detail of 19 employees from its Chicago regional office to New York. The court set September 4 as the date to consider granting the Authority's petition. But prior to the hearing, HUD and the American Federation of Government Employees reached an informal settlement on the unfair labor practice complaint. This was the Authority's first use of its power under 5 U.S.C. 7123(d) to request appropriate relief concerning a ULP complaint.

AFGE's charge of June 9 claimed that HUD failed to bargain on the impact and implementation of the detail before management's decision was carried out, and it requested injunctive relief. Upholding the union, the FLRA issued a ULP complaint on July 25. A month later the Authority sought a temporary injunction to: 1) obtain the return of the 19 HUD employees to Chicago, and 2) enjoin any further details from Chicago to New York pending the resolution of the dispute. The settlement, which was approved by the Authority's regional director, removed the need for the injunction.

Official Time Is Bargainable Issue

In an Army—AFGE case, the Authority reaffirmed its stand on the negotiability of paid time for union preparation for bargaining and impasse resolution. The Army Armament Research and Development Command, Dover, New Jersey had refused to bargain on the AFGE Local 225 proposal that "All preparation of proposals and impasse resolution shall be on duty time."

The Authority said that it had already ruled on this issue in earlier decisions, *3 FLRA No. 47 and 3 FLRA No. 49*, and that the proposal fell within management's duty to bargain. *(4 FLRA No. 24—September 4, 1980)*

Consultant

80-21

The Federal Labor-Management

Consultant

1 FLMC 80—21

United States of America
Office of
Personnel Management
Route to:

October 24, 1980

New Developments Checklist...

FLRA rules negotiable union proposal giving employees Miranda-type rights...p.1
Probationary employees can grieve dismissal...p.1
New FMCS rules...p.1
NTEU grieves IRS refusal to pay travel expenses for attendance at safety committee meetings...p.2
Bargaining calendar...p.3
Air Force charges AFGE with refusal to bargain...p.4
AFGE loses bid to bargain on gun box...p.4
Federal Service Impasses Tieline...p.4

Mum's the Word

"The employee has the right to speak or remain silent or refuse to give a written statement and shall be so informed by the Employer at the outset of the inquiry or investigation." The Federal Labor Relations Authority ruled negotiable this union proposal granting Miranda-like rights to employees during discussions with supervisors which might lead to disciplinary action. Local 1186, International Brotherhood of Electrical Workers made the proposal to the Navy Public Works Center in Hawaii.

Navy and OPM, as *amicus curiae*, alleged that the proposal unreasonably delays management's reserved right to take disciplinary action under the Federal Service Labor-Management Relations Statute. Further, by allowing an employee to remain silent during an investigation of the performance of assigned duties, the proposal interferes with management's right to assign and direct work. In management's view, an employee's failure to respond during an investigation constitutes insubordination.

Management charged that the proposal thwarts the statutory requirement of the maintenance of effective government operations. The proposal is also inconsistent with that section of the law excluding from bargaining a government-wide rule. Moreover, the act accords an employee the right to have a union representative at an investigatory examination—but not the right to remain silent once the representative is present. In its final argument, management cited court decisions upholding the discharge of government employees who refuse to answer questions on their public conduct.

The Authority was unpersuaded by management's reasoning. "There is no indication that compliance with the disputed proposal would make it impossible" for the agency to direct employees, assign work, or implement disciplinary action.

The FLRA viewed the proposal as creating a contractual right to remain silent during an investigation. Consequently, it was unnecessary to pass on whether this might constitute insubordination. Management had not demonstrated that the proposal was inconsistent with Navy's obligation toward effective government, or that it applied to a government-wide rule. Similarly misplaced, the Authority said, was management's reliance on court decisions on self-incrimination, because these decisions failed to address the question of the establishment of procedural rights by *contract. (4 FLRA No. 32—September 19, 1980)*

Dismissal of Probationers Held Grievable

The Federal Labor Relations Authority overturned Arbitrator Mark Santer's ruling that a probationary employee may not grieve his termination during the probationary period. A negotiated grievance procedure established under the Federal Service Labor-Management Relations Statute is equally available to all employees in the bargaining unit, probationers and non-probationers alike, the Authority held. Parties in the case were the Department of Labor and the National Council of Field Labor Locals, AFGE.

The act excludes "any examination" from coverage of the negotiated procedure, and the arbitrator had ruled that the probationary period was part of the examining process. The FLRA, however, concluded that nothing in the statute or its legislative history bars from permissible coverage a grievance or arbitration over the dismissal of probationers.

The Authority's decision rejected a long-standing Federal Personnel Manual description of the probationary period as "a final...step in the examining process."

At least three other cases on this same subject—the right of a probationary employee to grieve termination—are pending before the Authority. OPM has intervened as *amicus curiae* in one of the cases. If the Authority rules that a probationer can grieve dismissal, OPM and the agency involved will work to seek court review of the decision. *(FLRA No. 51—September 30, 1980)*

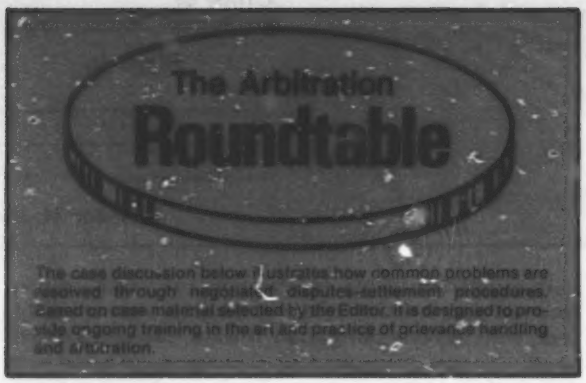
FMCS Issues Final Rules

New regulations of the Federal Mediation and Conciliation Service which define its role as peacemaker in Federal sector bargaining altercations are similar to earlier rules—except that the Service may now set time limits on its participation. FMCS provides its services in negotiation disputes on its own motion or at the request of one or both parties.

If the parties have not reached a settlement by the expiration of the time limits, FMCS may make "sug-

(Continued on page 4)

PM 1.13:



The case discussion below illustrates how common problems are resolved through negotiated disputes-settlement procedures, based on case material selected by the Editor. It is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

Reimbursement for Travel Time

Casefacts: An employee of the Internal Revenue Service in Fort Lauderdale, Florida was designated by his union to serve on the District Safety and Health Advisory Committee (SHAC). The employee went to the first four SHAC meetings in Jacksonville and Miami, and IRS reimbursed him for travel and per diem expenses. But before he attended the fifth meeting in Miami, management notified him that it would no longer pay these expenses. The employee attended the Miami meeting anyhow, and the National Treasury Employees Union filed a grievance.

Two clauses in the parties' contract were applicable to the grievance. Article 21 established a SHAC committee in each district, with two members designated by the union. SHAC meetings would be conducted during the normal tour of duty without charge to leave. In Article 28 the employer agreed to reimburse employees when in a travel status for per diem and mileage expenses incurred by them "in the discharge of their official duties."

NTEU argued that attendance at the SHAC meeting was "official duty" for which the employer was contractually required to pay. Moreover, by reimbursing the grievant for earlier meetings, IRS had established a consistent past practice.

Union representatives on the District's Labor Management Relations (LMRC) and EEO committees were reimbursed for travel, said NTEU. These two committees, composed of management and union, were created by the contract, and benefits given members of these committees should also be given to union representatives on SHAC.

According to IRS, the SHAC clause specifically stated that the union representatives' time at SHAC meetings would not be charged to leave. The clause was silent on travel, and if the contract had intended travel expenses to be paid it would have said so. In addition, employee representatives at the safety meetings were there to represent the union and not to discharge their official duties as employees.

Management denied the existence of a past practice. While it was true that the grievant had been reimbursed for four SHAC meetings, only one travel voucher clearly indicated that the reimbursement was for SHAC. Two vouchers listed LMRC as the activity for reimbursement, and the third merely listed an out-of-town location. A first line supervisor made a mistake in reimbursing for the single SHAC voucher—but this one instance did not establish past practice.

The employer pointed out that the contract expressly authorized LMRC travel reimbursement. Management granted EEOC reimbursement on a voluntary and nonbinding basis.

Issue: Whether union employee representatives to the Jacksonville District Safety and Health Advisory Committee are entitled by Articles 21 and 28 to reimbursement of their travel and per diem expenses while attending SHAC meetings.

Award: Arbitrator Edwin R. Render found for the employer. Management's refusal to reimburse employees attending SHAC meetings for representational purposes was proper and did not violate the contract.

Two major factors are required for the establishment of a past practice, the arbitrator said: frequency and long standing duration. One instance of reimbursement could not be considered either frequent or consistent, and therefore no practice had been established.

Privileges granted to members of the LMRC and EEOC committees were not interchangeable with the privileges of SHAC. LMRC members were specifically granted reimbursement by the contract; EEOC members were granted reimbursement because IRS deemed it necessary due to the unique public sensitivity in the field of equal employment.

A troubling aspect of the case, Arbitrator Render said, was that the grievant's duties at the SHAC meeting were of a hybrid nature. His attendance on behalf of the union benefitted NTEU, and his attendance as a committee member was of service to the IRS itself.

Although Article 28 provides travel payment for "official duties," noted the arbitrator, this phrase was nowhere defined in the contract. The union construed "official duties" as any tasks required by the employer. The arbitrator, however, favored the management definition as "only those actions required by the employer of its workers *as employees*—and not as persons who represent their fellow workers and their union in safety-related conferences."

Arbitrator Render also found that an agreement as lengthy and detailed as this one "is presumptively a complete expression of the agreement of the parties." Without a provision that SHAC members are entitled to travel payment, "it must be assumed that such a privilege is not contemplated by the contract." *(Internal Revenue Service Jacksonville District and National Treasury Employees Union Chapter 77—June 24, 1980. LAIRS #12878)*

FEDERAL BARGAINING CALENDAR

OPM's Office of Labor-Management Relations reports that 288 bargaining agreements will expire during the first half of calendar year 1981. These contracts cover 170,75 employees in non-postal Federal bargaining units. Of the 288 contracts, 169 can be automatically renewed. About 60 contracts are for two and three year terms.

The calendar below shows the expiration dates of major agreements, parties to the agreement, number of employees covered, and type of contract. "Auto-open" means agreements containing a fixed initial duration with an automatic renewal not limiting the number of renewals or the length of renewal periods. "Auto-limited" means automatic renewal agreements which limit either the number of renewals or the length of renewal periods.

The complete report, *Labor Agreement Expirations in the Federal Service*, January 1, 1981—June 30, 1981, OPM/OLMR 80/04, is available at $4.50 for a paper copy and $3.00 for microfiche. Order from the National Technical Information Service, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, Virginia 22161 (telephone 703-557-4693).

	Parties	Employees Covered	Type of Agreement
JANUARY			
16	DLA Defense Depot, Memphis, Tenn.—AFGE 2501	1,932	auto-open
28	Tobyhanna Army Depot, Pa.—AFGE 1647	3,100	auto-limited
30	Internal Revenue Service—NTEU	25,749	auto-open
30	Internal Revenue Service—NTEU	16,720	auto-open
FEBRUARY			
15	NASA, Johnson Space Center, Houston, Tex.—AFGE 2284	1,004	auto-open
15	NASA, Johnson Space Center, Houston, Tex.—AFGE 2284	1,423	auto-open
22	Naval Weapons Support Center, Crane, Ind.—AFGE 1415	1,748	3 years
MARCH			
5	Eglin AFB, Fla.—AFGE 1897	2,587	auto-open
9	Red River Army Depot, Texarkana, Tex.—NAGE 1452	3,160	auto-open
15	FAA Airport Traffic Control, Nationwide—PATCO	18,333	3 years
21	USA Headquarters, Fort Carson, Colo.—AFGE 1345	1,538	not available
26	Letterkenny Army Depot, Chambersburg, Pa.—NFFE 1429	2,801	auto-limited
29	USA Missile Command, Redstone Arsenal, Ala.—AFGE 1858	1,200	auto-open
APRIL			
2	Sharpe Army Depot, Lathrop, Calif.—AFGE 1546	1,321	auto-open
2	National RR Retirement Board, Chicago, Ill., Activity-wide—AFGE	1,539	auto-limited
10	Army and Air Force Exchange Service, Hawaii—IBEW	1,006	auto-open
MAY			
2	Navy Public Works Center, Norfolk, Va.—MTC	1,475	not available
10	USA Military Traffic Command, Bayonne, N.J.—AFGE 2855	1,011	not available
21	USA Headquarters, XVIII Airborne Corp., Fort Bragg, N.J.—AFGE 1770	3,687	not available
JUNE			
13	VA Hospital, Downey, Ill.—AFGE 2107	1,693	auto-open
14	Marine Corps Supply Center, Barstow, Calif.—AFGE 1482	1,743	3 years
15	USN Military Sealift Command, Bayonne, N.J.—NMU	1,681	2 years
15	VA Hospital, Miami, Fla.—NFFE 1453	1,176	not available
28	Naval Air Rework Facility, Norfolk, Va.—IAM 39	2,725	not available
30	DLA Cameron Station, Alexandria, Va.—AFGE 2449	1,503	auto-limited

The Federal Service Impasses TIE LINE

Recent actions of the Federal Service Impasses Panel resolved bargaining impasses in ten disputes.

The Panel recommended that the parties submit their dispute to an outside arbitrator for a final and binding decision on a final offer, issue-by-issue basis, with arbitration costs shared equally—Treasury, Internal Revenue Service, Los Angeles District and National Office, Los Angeles, California and Washington, D.C. and National Treasury Employees Union *(Case No. 80 FSIP 66, August 27, 1980)*.

In four cases, the Panel determined that voluntary efforts had not been exhausted and directed the parties to resume negotiations with mediation assistance:

- Air Force, 15th Air Base Wing, Hickam AFB, Hawaii and Service Employees International Union Local 556 *(Case No. 80 FSIP 60, August 20, 1980)*.
- Commerce, Maritime Administration, New York, New York and National Association of Government Employees Local R4-47 *(Case No. 80 FSIP 70, August 28, 1980)*.
- Norfolk Naval Shipyard, Portsmouth, Virginia and Tidewater Virginia Federal Employees Metal Trades Council *(Case No. 79 FSIP 70, August 29, 1980)*. The parties were also directed to submit their dispute to binding arbitration if it was not settled within 30 days following receipt of FSIP's determination.

(Continued from page 1)

gestions for settlement." If the parties reject these suggestions, the Service may refer the matter to the Federal Service Impasses Panel. FMCS will not refer a case to the Panel unless the mediation process is exhausted and the parties are at impasse.

In first-time negotiations the parties must notify FMCS within 30 days after bargaining begins. When an agreement already exists, the parties must notify the Service 30 days prior to the contract's termination or modification date. These requirements do not apply to mid-term or impact bargaining.

The rules, effective October 22, 1980, appeared in the *Federal Register* on September 22.

Air Force Files Charges Against AFGE

Reversing the usual scenario, management brought unfair labor practice charges against the union for refusal to bargain. Wright-Patterson AFB, Ohio took this action against AFGE because, under *2 FLRA No. 54*, an activity cannot request a negotiability decision if a union calls management's proposal unnegotiable. The union had refused to bargain on three Air Force proposals on the basis that they pertained to internal union affairs. The Authority dismissed the ULP charges, ruling the proposals outside the *mandatory* scope of bargaining, although AFGE could elect to bargain.

Management's proposals would have required the union to designate its representatives from specific organizational levels and segments. For example, the union would be required to select stewards only from employees located in the area the steward would represent. *(4 FLRA No. 39—September 29, 1980)*

- Navy, Recreational Services Department, Naval Amphibious Base, Little Creek, Norfolk, Virginia and American Federation of Government Employees Local 1625 *(Case No. 80 FSIP 63, September 8, 1980)*.

Because a threshold question was raised concerning the employer's obligation to bargain, the Panel declined to assert jurisdiction in these two cases:

- Transportation, Federal Aviation Administration, Dulles International Airport, Washington, D.C. and AFGE Local 2303 *(Case No. 80 FSIP 51, August 21, 1980)*.
- Choctaw Indian Agency, Philadelphia, Mississippi and National Federation of Federal Employees Local 452 *(Case No. 80 FSIP 55, August 29, 1980)*.

The parties reached a voluntary settlement prior to scheduled factfinding hearings in two cases:

- Army, Fort Sill, Oklahoma and NFFE *(Case No. 80 FSIP 48, August 12, 1980)*. The issues of office space, leave for training, and the suggestion program were resolved with the factfinder's assistance at the prehearing conference.
- Office of Personnel Management, Washington, D.C. and AFGE Local 32 *(Case No. 79 FSIP 53(a), August 15, 1980)*. The Federal Mediation and Conciliation Service assisted the parties in reaching agreement on flexible work schedules.

With the Panel's approval, the parties withdrew their request for assistance—U.S. Naval Hospital, Beaufort, North Carolina and AFGE Local 2796 *(Case No. 80 FSIP 67, September 3, 1980)*.

INS Has No Duty to Bargain on Gun Box

Management has no obligation to bargain on a "gun box" for seaport inspectors and detention officers at the New York office of the Immigration and Naturalization Service. That was the Authority's ruling on a proposal made by Local 1917, AFGE. The union had asked INS to provide a gun box where employees could store official or privately owned weapons while they were on duty inside the office.

So far as privately owned weapons are concerned, the Authority said, their secure storage is not directly related to working conditions under Federal labor law. As to official weapons, their storage concerns the agency's right to determine the technology of performing its work, and is negotiable only at the option of the agency.

The union had presented five additional proposals on other subjects, but INS refused to bargain, declaring them in conflict with the INS-AFGE master agreement. For these five proposals, the Authority told the parties to use the procedures in their master agreement for resolving disputes on the meaning of the contract's provisions. *(4 FLRA No. 25—September 4, 1980)*

Consultant

Published biweekly by the U.S. Office of Personnel Management. Editorial inquiries should be addressed to Editor, The Consultant, Office of Labor-Management Relations, Room 7H46, 1900 E Street, N.W., Washington, D.C. 20415. Phone (202) 632-6720.

All Federal departments and agency headquarters may order the Federal Labor-Management Consultant by sending a printing and binding requisition to the Government Printing Office, referencing GPO printing requisition No. 80-34. Individuals may subscribe through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, at $16.00 per year ($20.00 foreign). Make checks payable to the Superintendent of Documents.

Unless otherwise specified, materials in this publication do not represent expression of official policy. Section numbers cited are taken from Title V, U.S. Code, Part III, Subpart F, Chapter 71, Subchapter I—IV. Use of funds for printing this publication has been approved by the Office of Management and Budget through June 30, 1984.

80-22

The Federal Labor-Management

Consultant

1 FLMC 80-22

November 7, 1980

United States of America
Office of
Personnel Management
Route to:

New Developments Checklist...

Bargaining law replaces E.O. for Foreign Service employees...p.1
And a new bargaining law at GAO...p.1
FSIP issues order in Small Business Administration—AFGE impasse...p.1
Recoupment of union dues goes to arbitration...p.2
Authority reaffirms its stand on official time...p.3
Marine Corps found guilty of ULP...p.3
Federal Service Impasses TIELINE...p.4

First Bargaining Law for Foreign Service

Last month the president signed into law the first major revision of the Foreign Service Act since its passage in 1946. One part, Chapter 10, deals solely with labor management relations. It applies to Foreign Service employees at the State Department, International Communication Agency, U.S. International Development Cooperation Agency, Department of Agriculture, and the Commerce Department. Prior to the law, unions representing these employees were governed by Executive Order 11636.

While the new statute is generally similar to 5 U.S.C. Chapter 71 covering labor relations for other executive branch employees, there are some differences due to the unique conditions of Foreign Service employment. Recognized labor organizations still lack exclusive representation rights for grieving employees, but they gain the right of presence in the event a grievant chooses to be represented by other than the exclusive union.

The act establishes a three-member Foreign Service Labor Relations Board (FSLRB) to administer the program. The FSLRB is an entity within the Federal Labor Relations Authority, with the Authority's chairperson also acting as chairperson of the Board. The chairperson appoints the other FSLRB members from names nominated by agencies and unions covered by the statute. The chairperson may designate an alternate chairperson from among members of the Authority.

The General Counsel of the Authority serves as General Counsel for the FSLRB. The Board and its GC have the same duties as the Authority and its GC. Except for special circumstances, Board decisions must be consistent with Chapter 71.

The Foreign Service Impasse Disputes Panel is installed within the Authority. Its five members are selected by the FSLRB chairperson from the Foreign Service, Department of Labor, Federal Service Impasses Panel, and the general public.

The act establishes one worldwide unit for Foreign Service employees at the State Department.

Grievance procedures may now be negotiated, but instead of final decisions by an outside arbitrator, the final decisions are made by the Foreign Service Grievance Board. The Grievance Board, created by Chapter 11 of the Foreign Service Act in 1975, makes awards for grievances under both the negotiated grievance procedure and the agency grievance procedure.

The law takes effect on February 15, 1981.

New Labor-Management Program at GAO

The new General Accounting Office Personnel Act of 1980, 94 Stat. 27, contains a section requiring the agency to establish a labor-management relations program for its employees similar to the program for executive branch employees. Under section 3 (e), the GAO personnel system must "provide for procedures to ensure that each employee of the General Accounting Office has the right, freely and without fear of penalty or reprisal, to form, join and assist an employee organization, or to refrain from such activity, and shall provide for a labor-management relations program, consistent with chapter 71 of title 5, United States Code."

Last month the congressional agency set up a five-member personnel appeals board to deal with the determination of bargaining units, representation elections, and unfair labor practice complaints, as well as employee appeals and discrimination complaints.

Interim chairman of the board is Edward C. Gallas, vice-president of Organization Resources Counsellors, Inc., of New York City. Other members are Ellen M. Bussey, arbitrator and economic consultant; Robert H. Levan, attorney, arbitrator and former assistant deputy general counsel of the National Labor Relations Board; William J. Meagher, official with the Federal Mediation and Conciliation Service; and Ruthie Louise Taylor, an attorney active in the civil rights area.

GAO regulations are being issued to carry out the new statute which became effective October 1, 1980.

Panel Issues Order in SBA-AFGE Impasse

A bargaining impasse between the Small Business Administration and the American Federation of Government Employees ended when the Federal Service Impasses Panel ordered the parties to accept the employer's proposal on stays of personel actions. The Panel found that "the employer offered the more reasonable proposal in the circumstances of this case." FSIP's decision applies to about 2,300 SBA employees in the nationwide bargaining unit.

The two-part dispute hinged on 1) Whether a grievant should be granted a mandatory stay in cases involving suspension, adverse action, or action based on unacceptable performance, and 2) Whether the effective date for adverse action should be at least 10

(Continued on page 4)

PM 1.13:

Recoupment of Dues

Casefacts: In March 1978 a union member at Hill Air Force Base, Utah was promoted to supervisor, which took him out of the bargaining unit. From March 1978 to March 1980 the Base erroneously collected dues from the supervisor's pay and remitted them to the American Federation of Government Employees Local 1592. Upon discovering its mistake, management totted up the erroneously withheld dues to the sum of $272, deducted it from the total dues withholding amount owed AFGE, and remitted the sum to the supervisor.

The union complained that this procedure by management was illegal and asked to be reimbursed for all money so withheld during the prior 12 months. The grievance covered the supervisor's case and similar cases affecting Local 1592.

At the arbitration hearing, the parties cited their contract's Article 8 which authorizes voluntary dues withholding by bargaining unit members. Members may revoke checkoff by giving Standard Form 1188 or a written statement to the payroll department. Members lose eligibility for checkoff if they cease to be a part of the bargaining unit.

Article 8 makes management responsible for identifying employees whose allotments are terminated because they left the unit. "Administrative errors in remittance checks and/or improper deductions will be corrected by the Employer and adjusted in the next remittance check to be issued to the Union local. If the Union is not scheduled to receive a remittance check after discovery of the error, the Union agrees to promptly refund the amount of the erroneous remittance."

Dues authorization Form 1187 reads: "I further understand...that I may cancel this authorization by filing Standard Form 1188 or other written cancellation request."

Management pointed out that the Civil Service Reform Act requires termination of checkoff when the agreement ceases to be applicable to the employee. The Air Force also cited a 1978 decision of the former Federal Labor Relations Council which in turn cited a 1977 Court of Claims decision. Both decisions overturned arbitration awards which upheld union claims that management acted wrongly in recouping dues.

Management introduced in evidence that section of the Air Force Manual requiring the adjustment of any erroneous salary underpayments discovered for any employee, regardless of whether the employee files a written claim.

AFGE relied on a decision of U.S. District Court Judge Inzer B. Wyatt in Alabama which disallowed recoupment of union dues by the Army. *(USDC ND AL, Civil Action No. 78-W-5023NE).* Judge Wyatt's decision became final on February 12, 1979 when the U.S. Court of Appeals dismissed the Army's appeal.

Issue: Did management violate Article 8 by remitting $272 to the supervisor on March 15, 1980 for union dues erroneously withheld, and then setting-off that amount in March 1980 from funds withheld and paid to the union?

Award: Arbitrator Robert W. Smedley upheld the grievance, ordering management to reimburse the union all dues withheld from it and returned to former member employees since March 1979, plus interest.

The arbitrator was unpersuaded by the Council and Court of Claims decisions. "Two wrongs," he said, "do not make a right. Judge Wyatt in his ruling explained at length why such vacuous reasoning cannot be allowed to stand."

Arbitrator Smedley did not fault management for initially diverting the funds and handing them over to the supervisor, since it was relying on the Council decision. "With all due respect, however, this arbitrator cannot imagine a higher court upholding that ruling and, thus, feels no compulsion to follow it."

The award specifically stopped the supervisor from receiving the windfall return of his dues. "He, as well as management, had a duty to inform the union of his changed status," the arbitrator said. The arbitrator added that all the supervisor had to do was to fill out Form 1188 or write a note to that effect. Rather than doing this, he just let it ride.

Turning to the employer, the arbitrator concluded that while the Air Force is empowered to recoup its monies paid out through administrative error, "the money involved here does not belong to the Air Force. It belongs to the union." The contract sets up a trusteeship under which the payroll department withholds dues, holds them in trust for a time, and then pays the money over to its sole and rightful owner, the union.

"Once the paycheck is made out and delivered to the employee, the money no longer belongs to the Air Force. It belongs to the employee, who has spent it, in part, for his union dues. The part so spent no longer belongs to either the employee or the Air Force. It belongs to the union.

"The grievance is dated March 24, 1980. Giving almost a month for the word to get out, the Air Force should have known about and started following Judge Wyatt's edict by March 24, 1979... The Air Force can... withhold the money from the supervisor's future earnings. In the grievance the union offers to provide a list of employees who were 'reimbursed union dues' similarly to the supervisor. To the contrary, in order to atone for its mismanagement of trust funds, the Air Force should provide a complete accounting and pay the union all such funds wrongfully withheld since March 24, 1979, together with interest at the Utah statutory rate." *(Ogden Air Logistics Center, Hill Air Force Base, Utah and AFGE Local 1592—September 29, 1980. LAIRS No. 12828)*

Authority Reaffirms Its Interpretation of Payment for Official Time, Per Diem

The Federal Labor Relations Authority ruled that the Bureau of Alcohol, Tobacco and Firearms' Western Region is obligated by law to pay official time, travel and per diem expenses to an employee-union representative for his participation in collective bargaining negotiations. The unfair labor practice charge was filed by Chapter 81 of the National Treasury Employees Union when the Bureau refused to pay for a union steward's activities on February 23, 1979.

The Bureau contended that the Authority's interpretation and guidance on official time was "arbitrary and capricious, an abuse of discretion, and constitutes the establishment of a policy which is beyond the statutory authority of the Authority." (The Authority's interpretation of the official time provisions of CSRA section 7131(a) was issued as *2 FLRA No. 31*, December 19, 1979.)

The parties' correspondence on the negotiations began in November 1978, the Bureau said. In management's view, this meant that the case was initiated prior to January 11, 1979, the effective date of the law, and December 19, the date of the policy interpretation. Consequently, there should be no retroactive application of the statute and policy.

The agency argued further that the payment of per diem and travel expenses pursuant to *2 FLRA No. 31* was illegal because money was not specificaly appropriated for this purpose.

The Authority, however, adopted the findings of its Administrative Law Judge which rejected the Bureau's arguments. The ALJ similarly disallowed the Bureau's contention that this payment of travel and per diem was contrary to law.

Also without merit, the ALJ concluded, was the agency's argument on retroactive application of the law and the Authority's policy. The union's request and the agency's refusal to grant payment did not occur until February 21, 1979—and it was that demand and refusal which initiated the case. The Authority's interpretation, said the ALJ, governs all situations involving official time which took place after the effective date of the law.

The Authority ordered the employer to provide the union representative with official time for February 23, reimburse him for travel expenses, and make him whole for the annual leave he utilized on that date *(4 FLRA No. 40—September 29, 1980)*

Tell It to the Marines

Completely upholding its administrative law judge's conclusions, the Federal Labor Relations Authority found the U.S. Marine Corps guilty of an unfair labor practice when it denied an employee's request for union representation at an interview resulting in disciplinary action. The employee, an inventory management specialist at the Marine Logistics Base in Albany, Georgia, had asked that her American Federation of Government Employees representative be present.

The employee's supervisor and branch head called the interview to interrogate her about her week-long absence from work. Management ignored her requests for union representation until *after* she received "the letter." A week later she was notified of a proposed five-day suspension based on her unauthorized absence.

The personnel office subsequently advised the supervisor that prior to the meeting he should have notified the employee of her right to representation. The supervisor then rescinded the suspension, set up anther meeting, and notified the employee that she was entitled to union representation.

At the second investigatory meeting management asked the same questions, and the AFGE representative told management to use the information provided at the previous investigation. The employee later received a new notice of the proposed disciplinary action, and still later was suspended.

The activity argued that its second investigation of the employee's absence with a union representative present, corrected any initial wrongdoing by management, and that any violation was merely technical.

The ALJ disagreed, holding the management's violation of "Weingarten" rights under Title 5 section 7114 (a) (2) (B) was not trivial. While management followed the proper procedure at the reinvestigation, this did not cure the violation at the first meeting. The ALJ accordingly found that the employer had interfered with the employee's rights and had failed to comply with provisions of the law.

The Authority's Office of the General Counsel contended that the remedial relief should include the revocation of the suspension, a restoration of back pay or leave, and the removal of all material on the suspension from the employee's personnel file. The ALJ, however, was not persuaded that no discipline would have been invoked if the employee had had union representation at the initial meeting. He concluded that the second investigative meeting provided a reasonable basis for suspending the employee.

"Accordingly," he said, "the *status quo ante* remedy seems impractical under these circumstances and I make no order in this respect." *4 FLRA No. 54—September 30, 1980)*

(Continued from page 1)

days after the employee was notified of the action.

The employer's proposal gives management the right in discharge cases to deny a request by the affected employee that action be stayed for up to 120 days, pending resolution of his/her grievance. In making its decision, management must consider such factors as new evidence; the employee's efforts to retire within the 120 day time period; and active job hunting by the grievant with reasonable prospects of find other employment.

SBA also proposed that the grievance process be waived in discharge cases so the union could proceed immediately to arbitration. This suggestion was made because the adverse action process would already have involved steps similar to those in the grievance procedure, and often the same chain of officials. The time savings would benefit both the employee and the employer.

The AFGE proposal, on the other hand, would have guaranteed the employee's right in such cases to remain in a pay status for 190 days while exhausting the grievance or appellate procedure. Under this proposal, adverse actions could not go into effect until at least 10 days after the employee was notified.

In its presentation to the Panel, SBA contended that mandatory stays of personnel actions are unnecessary and could have an adverse effect on agency operations. Its officials follow clearly defined procedures before taking a removal action, and these procedures afford employees more protections than required by OPM.

Because SBA employees handle billions of dollars in loans, the employer said, they must adhere to strict rules to maintain the public's confidence. In the past the agency has been severely criticized by Congress and the media when it did not remove employees charged with criminal activities. Only a few of the Federal agreements negotiated since enactment of the Civil Service Reform Act provide for this kind of stay of personnel action. A Panel decision requiring a mandatory stay would be contrary to accepted labor relations practice in both the private and Federal sectors.

SBA also maintained that the act increased management's authority to remove individuals for unacceptable performance. To stay personnel actions would frustrate the intent of Congress and limit management's statutory right to suspend or discharge.

AFGE argued that Federal employes need the additional protections offered by its proposal. Practice in the private sector is not analogous because Federal employees cannot strike or negotiate on wages or agency shop. SBA employees are particularly vulnerable because their unique skills and special expertise make it difficult for them to obtain other jobs if they are fired. The union cited personal hardships like the loss of income and home, marital strife, and long delays before reinstatement.

The Panel noted that the Federal Labor Relations Authority had earlier ruled negotiable a proposal to stay a disciplinary suspension or removal until a grievant exhausted appeals through the grievance and abitration procedures of the contract, *2 FLRA No. 16.* While the Authority's decision was based on the statute's legislative history, it did point out that common practice in the private sector is for management to implement the disciplinary action, subject to reversal or modification by a subsequent arbitration decision. *(Case No. 80 FSIP 30, October 6, 1980)*

The Federal Service Impasses TIE-LINE

The Federal Service Impasses Panel settled four bargaining impasses by use of the final-offer selection technique. In one case the Panel determined that the parties should make written submissions following which it would take whatever action was necessary to resolve the impasse. In the others the Panel indicated that it would make a final-offer selection of either party's proposal on each issue following written submissions. All four cases arose out of negotiations at the national level.

The Panel ordered adoption of the union's proposals regarding negotiated grievance procedures and midterm bargaining, and the employer's proposal on official time—Treasury, Bureau of Government—Financial Operations, Austin, Texas and National Treasury Employees Union *(Case No. 80 FSIP 21, August 27, 1980).*

Telling both parties to withdraw their proposals on duration, the Panel selected the union's proposals on tours of duty, scope of the grievance procedure, and distribution, and the employer's proposal concerning position descriptions—Veterans Administration—Medical Center, Iron Mountain, Michigan and American Federation of Government Employees Local 2280 *(Case No. 80 FSIP 41, August 27, 1980).*

The issue of official time was resolved when FSIP selected the employer's proposal—VA Medical Center, Marion, Indiana and AFGE Local 1020 *(Case No. 80 FSIP 44, August 27, 1980).*

The Panel adopted the employer's position on employee rights, promotions, disciplinary actions, and grievance procedure, and the union's proposals with regard to official time, arbitration, official facilities, official travel, and maintenance of standards—VA, Truman VA Medical Center, Columbia, Missouri and AFGE Local 3399 *(Case No. 80 FSIP 45, August 27, 1980).*

Consultant

80-23

The Federal Labor-Management

Consultant

1 FLMC 80-23

November 21, 1980

United States of America
Office of
Personnel Management
Route to:

DEC 9 1980

U. S. GOVT. PUBS.
DEPOSITORY 376

New Developments Checklist...

Union proposal on reduction of work hours is ruled negotiable by Authority... p.1

James J. Shepard named FLRA's Executive Director... p.1

Management's omission in notifying AFGE of planned reorganization brings ULP order... p.1

National Weather Service and union go to arbitration over training of potential contractor employees... p.2

First Annual Report of FLRA and its General Counsel... p.3

OSHA issues final rules for Federal program... p.4

IAFF prevails in petition requesting fire captains' inclusion in bargaining unit... p.4

Arbitrator rules VA probationer cannot grieve dismissal under negotiated grievance procedure... p.4

Hi Ho, Hi Ho
It's Off to Work We Go

The Federal Labor Relations Authority ruled that Fort Meade, Maryland must bargain on the union's proposal that "Hours of work for employees in the unit will not be reduced without just cause." The Army had contended that the proposal by the American Federation of Government Employees Local 1622 was negotiable only at the option of the employer.

The agency also argued that the proposal would interfere with the exercise of management's reserved right to determine the numbers, type and grades of employees assigned to work projects and tours of duty. The Authority, however, judged that the Army had not demonstrated that the proposal was "integrally related" to this type of determination by management. Further, said FLRA, management has a duty to bargain on procedures it uses in exercising its rights, and on appropriate arrangements for employees adversely affected by the exercise of management rights.

The ruling held that the disputed proposal established a general, nonquantitative contractual requirement. Employees whose work hours were reduced and who believed they were adversely affected, could grieve management's action.

"Review by an arbitrator would not preclude the agency from reducing hours of work in accordance with the employee's job description, nor would it result in the substitution of an arbitrator's judgment for that of the agency. It would simply determine if the agency's decision regarding the reduction in hours as applied to the grievant complied with the 'just cause' requirement of the parties' agreement." *(4 FLRA No. 66—October 17, 1980.)*

FLRA Selects Executive Director

James J. Shepard has been selected as Executive Director of the Federal Labor Relations Authority. The selection was made following a nationwide search.

As Executive Director, Mr. Shepard will serve as the top career manager for the Authority. He will be responsible for providing managerial direction and executive leadership in achieving the Authority's mission under Title VII of the Civil Service Reform Act and related laws.

Mr. Shepard has served in a similar capacity as Managing Director of the National Transportation Safety Board for the past two years. Prior to that, he held a number of top management positions in the Department of Air Force, including Director of Administration in charge of several thousand employees. During his 28-year career with the Federal government, Mr. Shepard has achieved notable gains in modernizing programs, including results-oriented equal employment opportunity initiatives and improvement of the quality of work life.

He is an alumnus of Virginia Tech and holds an MBA in industrial management from the Wharton School of the University of Pennsylvania, and a PhD in business administration from St. Louis University.

Air Force Committed ULP, Authority Rules

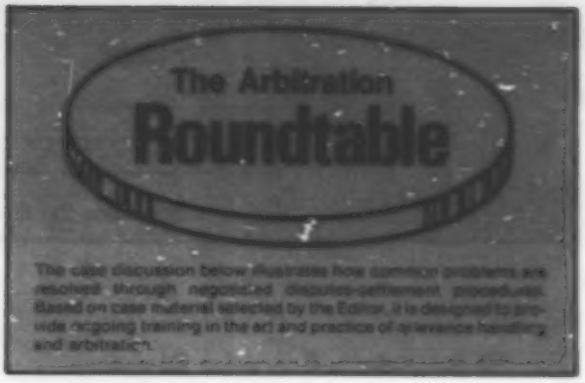
The Air Force Logistics Command in Newark, Ohio was found guilty of an unfair labor practice by failing to give the exclusive representative an opportunity to bargain on a proposed reorganization. AFGE Local 2221 charged that the Command did not give timely prior notice of the reorganization. In ruling that a ULP had been committed, the Federal Labor Relations Authority overturned a recommendation by its Administrative Law Judge that the AFGE charge be dismissed.

A week before the reorganization was to be implemented, the activity held an employee meeting to announce the proposed change. A union steward attended the meeting, and management argued that his presence constituted timely notice to the union. AFGE rebutted that the steward was present only as an employee—not as a union official.

The Authority accepted the union's reasoning. The chance knowledge of AFGE's agent did not constitute appropriate advance notice to that agency or other union official as a *union representative*.

(Continued on page 4)

PMI. 13.


The Arbitration
Roundtable
The case discussion below illustrates how common problems are resolved through negotiated disputes-settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

Keep a Weather Eye Open

Casefacts: For economic reasons the National Weather Service decided to contract out work performed at the Meteorological Observatory in Quillayute, Washington, and sought a suitable contractor to take over the job. Part of the process involved an on-the-job training program for 11 Quileute Indians, beginning in December 1979. Bargaining unit employees were assigned as trainers.

The employees were upset both by the possibility of contracting out and the uncertainty this caused. Their objections were intensified when they were ordered to train their potential replacements. The National Weather Service Employees Organization (NWSEO) filed a grievance.

The training program was unsuccessful, and the Service was still negotiating with another contractor when the arbitration hearing took place.

The union alleged that assigning bargaining unit employees to train potential contractor employees violated the contract. Article 18 requires position descriptions to state the principal duties and responsibilities of a job. Principal duties are defined as those which, over a yearly cycle, occupy about 10 percent of an employee's time. The challenged duty training was not listed in the description.

NWSEO contended that management's decision to subcontract without providing a method of appealing that decision violated "one of the basic goals of unionization—the employees' quest for certainty and stability," and thus undermined the concept of collective bargaining and the purpose of the Civil Service Reform Act (CSRA). Further, the failure to provide an appeal mechanism violated a March 1979 OMB circular requiring management to adopt an appeal procedure before deciding to contract out operations.

The union recognized that some of its claims went beyond the terms of the contract and required interpretation of the OMB circular. It believed, however, that the circular was incorporated by reference in the contract since Article 4 of the contract gives management the right to contract out.

The National Weather Service took a much narrower view of the case. Both Article 4 and the CSRA list as management's reserved right the authority to contract out and assign work. Article 9 explicitly excludes "interpretation of Federal law or any government rule" from the negotiated grievance procedure. The employer accordingly argued that management rights and government-wide regulations are not arbitrable issues.

In management's view, the only contractual issue properly before the arbitrator was the interpretation of Article 18 dealing with the position descriptions. The Service denied breaching that section because only principal duties occupying 10 percent of an employee's time must be included in position descriptions. Not only did the union present no evidence that this would be the case for training contractor personnel; the NWSEO counsel actually admitted the contrary.

Issues: Did the Service's contracting out plan violate the union's raison d'etre and the purpose of CSRA? Did management's action violate the OMB rule? Did the plan violate Article 18 of the contract?

Award: Ruling first on the threshold issue, Arbitrator Dennis R. Nolan found inarbitrable the union's claim that management violated the purpose of CSRA and the OMB circular. The contract limits the authority of the arbitrator to interpretation and application of the agreement. Article 9 excludes from the grievance procedure the interpretation of Federal laws and government-wide rules. "The union's case must rest on the negotiated agreement," said the arbitrator. The union failed to show that training the Quileutes occupied more than the 10 percent of annual work time needed for principal duties under Article 18. Beyond the specific provisions of Article 18, the union's general objection to the training assignment ran counter to management's right to assign and direct employees.

Arbitrator Nolan commented that the union was principally concerned about the likelihood of contracting out, and the uncertainty pending a final decision. "The grievance represents a desperate attempt to bring these concerns before some objective forum," he said.

"For the reasons stated above the arbitrator is prohibited from resolving the fundamental issues raised by the union. That should not be taken as a reason for the employer to ignore the employees' concerns. Just the opposite should be the case, for the union's counsel correctly pointed out that the thrust of the OMB circular and of Federal sector collective bargaining legislation is to involve employees in decisions that affect them. I have no reason to suppose that the NWS opposes this objective, and I trust that the employer will interpret the filing of this grievance as a strong indication that the Quillayute employees regard existing lines of communication as insufficient. Some additional effort on the employer's part may eliminate this perception, to the advantage of both management and labor."

The arbitrator found the grievance "inarbitrable so far as it asks the arbitrator to rule on matters outside the collective bargaining agreement. The remainder of the grievance is arbitrable. The grievance is denied on the merits." *(National Weather Service, Western Region and National Weather Service Employees Organization, MEBA—September 15, 1980. LAIRS No. 12859.)*

First Annual Report of the Federal Labor Relations Authority

The Federal Labor Relations Authority came into being on January 1, 1979. As an independent agency in the executive branch, it administers Title VII, Federal Service Labor-Management Relations, of the Civil Service Reform Act of 1978. All duties previously performed by the Federal Labor Relations Council and many duties of the Assistant Secretary for Labor-Management Relations under Executive Order 11491 were assumed by the FLRA. It was also given new responsibilities.

The Authority has issued its first annual report for the fiscal period January 1—September 30, 1979. The report traces the history of the Federal sector labor program as well as describing the operations of the Authority and its Office of the General Counsel. The last section of the report, the Federal Service Impasses Panel, was summarized in the October 10 CONSULTANT.

The three full-time members of the Authority were appointed by the President and confirmed by the Senate: Chairman Ronald W. Haughton of Michigan; Henry B. Frazier III of Virginia; and Leon B. Applewhaite of New York. The FLRA's General Counsel, also appointed by the President and confirmed by the Senate, is H. Stephan Gordon of Maryland.

Role of the Authority

The Authority provides leadership in establishing policies and guidance for matters under Title VII and is responsible for carrying out the purpose of the statute. Its duties include determining bargaining units, supervising elections, deciding negotiability issues, adjudicating unfair labor practice cases, and resolving exceptions to arbitrator's awards. The Authority's Administration Law Judges hear unfair labor practice cases, and their findings go to the Authority for final dispositions.

The General Counsel investigates alleged unfair labor practices, files and prosecutes complaints, and exercises such other powers of the Authority as the FLRA may prescribe. In addition, the General Counsel directs all GC employees in FLRA's nine regional offices. Regional offices are located in Boston, New York, Washington, D.C., Atlanta, Chicago, Dallas, Kansas City, Los Angeles and San Francisco.

Case Closings

During its first nine months the Authority issued formal decisions or took other dispositive action on 213 cases pending at the national office level:

Policy/Guidance	4
Arbitration cases	16
Negotiability cases	38
Representation cases	22
Unfair labor practice cases	52
Appeals from A/SLMR decisions	30
Requests for review	49
Other	2
Total cases closed	213

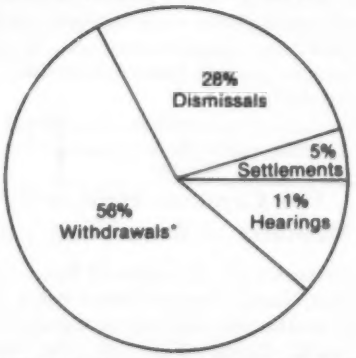
The General Counsel

From the beginning, the FLRA experienced unprecedented numbers of case filings. Almost as many representation and unfair labor practice cases were filed in the FLRA's regional offices during the first six months of 1979 as were filed for all of FY 78 under the Executive Order program. The Authority also inherited a backlog of cases from the previous program.

Before the General Counsel can investigate an alleged fair labor practice, an unfair labor practice charge must be filed with the regional director by an agency, union or individual. The regional director, on behalf of the General Counsel, investigates the charge. The director may then approve a written settlement agreement, approve a request to withdraw the charge, dismiss the charge, issue a complaint, or transfer the case to the Authority for decision after the issuance of a complaint based on a stipulation of facts agreed to by the parties.

In FY 79 the regional offices had a workload of 2,879 unfair labor practice cases. (This number includes cases filed under both the Order and the Statute). In this same period, 1,064 unfair labor practice cases were closed. The pie chart below illustrates the disposition pattern.

Disposition Pattern for Unfair Labor Practice Cases, Fiscal Year 1979



*Includes unsolicited withdrawals and solicited withdrawals (based on a determination after an investigation that charge is without merit).

In addition to the unfair labor practice cases, the regional offices dealt with 704 representation cases. The cases covered petitions for exclusive recognition, decertification, clarification of a matter relating to representation, unit clarification, unit consolidation, amendment of certification, and determination of eligibility for dues allotment.

The *First Annual Report of the Federal Labor Relations Authority and the Federal Service Impasses Panel* is for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

(Continued from page 1)

"The collective bargaining relationship envisaged by the statute," the Authority said, "requires that each party have the ability to function as an equal partner within the relationship. It follows that each party should therefore deal with other with the directness and dignity appropriate to partners on an equal footing." *(4 FLRA No. 70—October 24, 1980.)*

OSHA Issues Rules for Federal Program

The Occupational Safety and Health Administration has issued final regulations implementing Executive Order 12196 on safety and health programs for Federal employees. Three aspects of the basic program have special implications for Federal labor-management relations:

- The E.O. encourages the establishment of joint labor-management safety and health committees comprised of management and employee or union representatives. The rules permit committees to be formed at the national level and other appropriate levels (individual establishments or groupings of establishments), with the result that only those establishments which have set up such committees will be largely free from unannounced OSHA inspections. The rules also outline the composition and authority of the committees.
- Employee complaints of unsafe and unhealthful working conditions are essentially informational in nature, and are not grievances. Whether employees may also grieve these issues is a separate matter that does not alter the basic principle of employer responsibility to correct poor conditions.
- The rules reflect the concept that an employee may refuse to work where he or she has a reasonable belief that the task involved poses an imminent risk of death or serious physical harm coupled with a reasonable belief that there is insufficient time to seek effective redress through normal hazard reporting and abatement procedures.

The rules, which appered in the *Federal Register* of October 21, 1980, took effect immediately.

Fire Captains Held to Be Members of Bargaining Unit

Six employees with the titles of Fire Captain at the Philadelphia Naval Shipyard were ruled nonsupervisors by the Authority, and hence members of the bargaining unit. Local F-61 of the International Association of Fire Fighters had petitioned for unit clarification.

The record showed that the captains meet several standards of supervisory authority. This includes their authority to fill in for the assistant chiefs; issue up to two-day suspensions; participate in the negotiated grievance procedure for personal types of grievances; and grant official time for labor-management representation activities.

However, the record further revealed that a *majority* of their work time does not involve the exercise of supervisory authority. Much of their workday is spent performing routine administrative and clerical duties; conducting building inspections along with firefighters; issuing "hot work" permits without the accompaniment of the firefighters; and responding to alarms where the assistant chief directs the firefighting effort.

The Authority found that although certain aspects of the captains' function may involve supervisory responsibilities, they are not supervisors within the meaning of section 7103 (a) (10) of the Federal Service Labor Management Relations Statute. That is, they do not "devote a preponderance of their employment time in the eercise of such responsibilities." *(4 FLRA No. 67—October 17, 1980.)*

Probationers Can't Grieve Dismissal, Arbitrator Rules in VA—AFGE Case

Sustaining the position of the Veterans Administration Hospital in Kerrville, Texas, Arbitrator Preston J. Moore ruled that the hospital had not violated the agreement by terminating a probationary employee without establishing just cause. The arbitrator found that under section 7121 (2) (c) of Title 5, a probationary employee does not have the right to use the grievance procedure. AFGE Local 2281 had contended that the contract requires that employees may be discharged only for just cause, and that the probationer had a right to grieve her dismissal.

Title 5 prohibits any examination from the grievance procedure, Arbitrator Moore said, and the Federal Personnel Manual regards the probationary period as a final step in the examination process. The arbitrator further determined that the FPM authorizes the employer to terminate a probationary employee "without undue formality," which means without being required to establish just cause under the grievance procedure.

Although management need not establish just cause, it must comply with the FPM and the directives of OPM, the award said. Arbitrator Moore found that the VA had complied with the controlling regulations, and he found no evidence that its action was arbitrary or discriminatory. *(Veterans Administration Hospital and American Federation of Government Employees Local 2281—July 3, 1980. LAIRS No. 12679)*

Consultant

Published biweekly by the U.S. Office of Personnel Management. Editorial inquiries should be addressed to Editor, The Consultant, Office of Labor-Management Relations, Room 7535, 1900 E Street, N.W., Washington, D.C. 20415. Phone (202) 653-8722.

All Federal departments and agency headquarters may order the Federal Labor-Management Consultant by sending a printing and binding requisition to the Government Printing Office, referencing OPM printing requisition No. 90-54. Individuals may subscribe through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, at $16.00 per year ($20.00 foreign). Make checks payable to the Superintendent of Documents.

Unless otherwise specified, materials in this publication do not represent regulation or official policy. Section numbers cited are taken from Title 5, U.S. Code, Part III, Subpart F, Chapter 71, Subchapter I—IV. Use of funds for printing this publication has been approved by the Office of Management and Budget through June 30, 1984.

80-24

The Federal Labor-Management

Consultant

1 FLMC 80-24

NEWARK PUBLIC LIBRARY
DEC 18 1980
U. S. GOVT. PUBS.
DEPOSITORY 376

United States of America
Office of
Personnel Management
Route to:

December 5, 1980

New Developments Checklist...

Kentucky National Guard ordered to negotiate the wearing of military uniforms with NAGE...p.1
AFGE must adopt employer's proposals, says Panel...p.1
FLRA denies requests for policy statements...p.1
Pest control personnel at AFB claim hazard pay...p.2
Authority dismisses negotiability appeal in GSA-AFGE case...p.3
NTEU prevails with unfair labor practice charge against IRS...p.3
Federal Service Impasses TIELINE...p.3
Panel explains procedures it uses to settle disputes...p.4

Command Decision

The Federal Labor Relations Authority ruled that the Kentucky National Guard's refusal to bargain over the wearing of military uniforms by civilians, pursuant to an order by the Federal Service Impasses Panel, is an unfair labor practice. The Panel had directed the activity to negotiate with Local R5-100 of the National Association of Government Employees concerning the option of employees, while performing technician duties, to wear the uniform or civilian attire. The Guard's refusal violated section 19(a)(1) and (6) of Executive Order 11491. Further, said the Authority, the Guard compounded its error by making statements that the wearing of civilian attire by technicians in their day-to-day work was not in the best interest of the technician program.

The Kentucky local had been seeking to bargain on this issue since 1971. On August 22, 1978 the Panel ordered the parties to adopt language giving technicians the option of wearing either military or civilian dress, and to negotiate on circumstances under which uniforms might be required. *(4 FLRA No. 73—October 31, 1980)*

Panel Orders Adoption of Agency Proposals

Using the last-best-offer procedure, the Federal Service Impasses Panel ordered the adoption of four proposals made by the Federal Home Loan Bank Board in New York City to the American Federation of Government Employees. The disputed issues were implementation of agency-wide policies, personnel records, union travel expenses and official time.

- The employer wanted to implement changes if the parties did not reach agreement on the impact and implementation of nondiscretionary changes in personnel policies and working conditions and in mission, organization and functions within 30 days. AFGE opposed implementation until agreement was reached.
- The agency proposed removal of records relating to possible disciplinary actions within two years after their placement in an employee's personnel file. The union sought retention for no more than a year.
- The Board proposed payment of a grievant's travel expense and one-half of similar expenses for the union representative under certain conditions. The union wanted all travel expenses paid for its representative except for arbitration hearing days.
- The employer offered a "reasonable amount" of official time, whereas AFGE proposed 180 hours per year. *(Case No. 80 FSIP 53, October 22, 1980)*

Authority Declines to Issue Major Policy Determinations

The Federal Labor Relations Authority denied a request to issue a major policy determination on whether an employee of an agency or a primary national subdivision—who is not in the same bargaining unit for which a contract is being negotiated—can be granted official time for representation of an exclusive bargaining unit with in the agency. The proper forum for such issues, said the Authority, is the unfair labor practice procedures under section 7118 of the Civil Service Reform Act. The joint request was made by the National Weather Service Employees Organization and the Commerce Department's National Oceanic and Atmospheric Administration. *(4 FLRA No. 75—November 4, 1980).*

NFFE and the National Guard Bureau

The Authority also turned down a request from the National Federation of Federal Employees for a policy statement. The request concerned whether appeals of adverse actions involving National Guard technicians must be expressly included from coverage of negotiated grievance procedures because of a conflict with the National Guard Technicians Act of 1968.

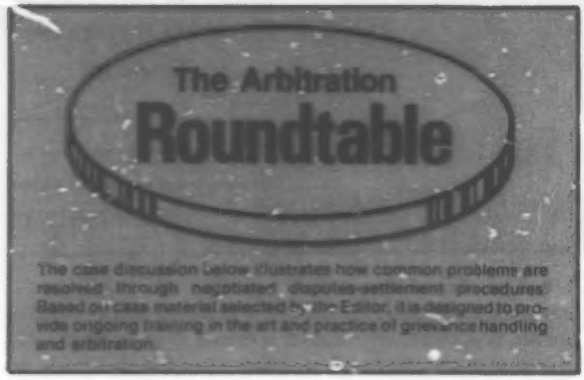
The act states that notwithstanding any other provision of law, an adverse action involving discharge, suspension or demotion shall be accomplished by the adjutant general of the jurisdiction concerned. A right of appeal which may exist for this type of adverse action "shall not extend beyond the adjutant general of the jurisdiction concerned."

NFFE's request was made because some of its locals are trying to negotiate broad-scope grievance procedures, and the National Guard Bureau claims that appeals of adverse actions against Guard technicians cannot be sent to arbitration.

The Authority noted that the question could more appropriately be resolved by other means, specifically, by the duty to bargain in good faith under section 7117 of the CSRA. The Authority also cited earlier decisions (3 FLRA 124, 3 FLRA 48) in which it was noted issues of grievability can be resolved through the arbitration

(Continued on page 4)

PM 1.13:


The Arbitration
Roundtable
The case discussion below illustrates how common problems are resolved through negotiated disputes-settlement procedures. Based on case material selected by the Editor, it is designed to provide ongoing training in the art and practice of grievance handling and arbitration.

Differential Pay for Pest Controllers

Casefacts: For six years pest controllers at the Hill Air Force Base, Utah were paid a 4 percent environmental differential based on their exposure to toxic chemicals. But in 1977 the Base's Environmental Differential Pay (EDP) Committee discontinued the differential. A new ventilating system had been installed in the mixing room. Moreover, an AFB industrial hygienist reported that if pest control personnel followed all protective procedures and used protective clothing at all times, the hazards had been practically eliminated. The committee did not seek other data from outside sources.

AFGE Local 1592 grieved, claiming that management's actions violated the contract. In addition, the grievants were entitled to an 8 percent differential rather than the 4 percent previously granted.

Under the contract, management agreed to strive to provide a safe and healthful work place and environment, to comply with applicable laws and regulations, and to furnish protective devices and special clothing. The agreement also established the EDP Committee to review situations and determine environmental differential (hazard) pay.

At the arbitration hearing both parties cited Appendix J of FPM Supplement 532-1. This specifically prohibits payment of environmental differential where the potential for personal injury has been "practically eliminated." A differential must be paid when an agency cannot overcome the unusually severe nature of the hazard: 8 percent differential for exposure to toxic chemicals of high degree hazard and 4 percent for low degree hazard.

AFGE introduced expert witnesses and reports showing that pest controllers work in a hazardous environment. Controllers' duties include handling, mixing, transporting and applying such chemicals as chlordane and cyanide to kill animals, vegetation and fungus. The degree of hazard varies according to the toxicity of the compounds, level of concentrate and length of exposure. Inhalation, ingestion or absorption may cause serious respiratory disease, skin disease or even death. Some of the chemicals are carcinogenic, mutagenic and neurotoxic.

The union acknowledged that the Base provided protective clothing, including cotton twill overalls and respirators. The overalls, however, were not provided until six months after the grievance was filed. The respirators covered only the mouth and nose; it was not until just before the arbitration hearing that respirator hoods protecting the entire head and neck were issued.

The grievants complained that their clothing was saturated when sprayers malfunctioned or the wind shifted. At times poor ventilation caused temporary nausea and headaches. Most of these incidents were not reported because the resulting discomfort was not severe or lasting, although one grievant developed a skin allergy to pesticides.

Management contended that the testimony of expert witnesses showed that the hazard of pesticide application at the AFB had been practically eliminated. To practically eliminate a hazard does not require total elimination of all potential danger, the AFB said. Payment of the differential must rest on current knowledge of potential hazards—not on a suspicion of possible long term adverse affects. Also, personnel records showed no excessive absenteeism.

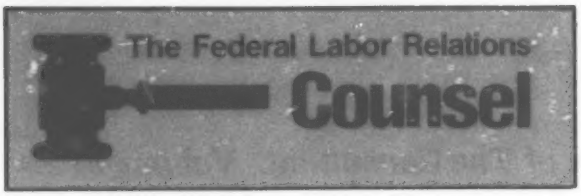
The AFB pointed out that an AFGE representative was a member of the committee, and the grievants had a chance to present their case fully at the committee meeting.

Issues: Did the action of the EDP Committee in terminating the differential pay violate the contract? If so, what is the proper differential to be paid under Appendix J?

Award: Arbitrator John Phillip Linn found that the EDP Committee failed to make a reasoned decision based upon all available information. The hazards had not been "practically eliminated" so as to warrant the discontinuance of the environmental hazard pay. He accordingly ordered reinstatement of the differential hazardous duty pay at 8 percent, retroactive to January 1, 1977.

The agreement, said Arbitrator Linn, places the burden on the employer to provide a safe and healthful work environment. Management must use all possible means to reduce the danger to its lowest possible level—that level at which the danger is truly inseparable from the performance of the required duties—or compensate employees through hazard or environmental differential pay. The protective clothing and respirators used did not reduce the risk of danger to the lowest possible level.

On the basis of the evidence, the grievants are required to work with materials which pose potential, imminent and long range danger to health. Where, as here, the likelihood of harm is supported by substantial evidence, it is not necessary to wait for conclusive proof. *(Ogden Air Logistics Command, Hill Air Force Base, Utah and American Federation of Government Employees Local 1592—May 30, 1980, LAIRS #12954)*



Negotiability Appeal Dismissed

If there has been no change in personnel policies, practices and working conditions, can the union initiate bargaining during the life of a contract? This question arose when the American Federation of Government Employees sought to negotiate with GSA's National Archives and Records Service on changes in journeyman levels of career ladder positions. The Authority, however, dismissed the union's negotiability appeal, suggesting that a determination was best accomplished through the unfair labor practice procedures. *(4 FLRA No. 84—November 12, 1980)*

Equal Rights for EEO Committee Members

The Federal Labor Relations Authority ruled that the Internal Revenue Servcie committed an unfair labor practice under Executive Order 11491 when, on three separate occasions, it threatened or interfered with the performance of the functions of union-appointed members of an Equal Employment Opportunity Advisory Committee. The unfair labor practice charge was filed by Chapter 10 of the National Treasury Employees Union, which represents employees at the IRS Chicago District Office.

The first incident occurred at the December, 1978 meeting. A discussion, concerning the lack of statistical information pertaining to the failure rate of minorities in the training program for new employees, resulted in a union committee member volunteering to contact employees involved in the training program and obtain statistics on the failure rate. An agency manager told him that such an action on his part could jeopardize his career with the IRS since the Director did not want the information collected. The Authority held that the manager's action constituted a violation of Section 19(a)(1) of the Order.

A second violation of Section 19(a)(1) occurred a week later at a briefing session on the EEO meeting held between the union appointed chairperson and the Assistant District Director. The Assistant Director told the chairperson that the minutes of the previous EEO committee meetings were inaccurate and slanted, and angrily cautioned her that no future briefings would be held if she continued to make written reports to the committee on what transpired at the briefing sessions.

The FLRA also ruled that a third violation of 19(a)(1) occurred when the chairperson was called to attend a meeting with the District Director. She requested that a fellow committee member accompany her to the meeting. The Director refused to allow the member to attend. At the meeting, the chairperson was questioned about and criticized regarding a list of questions which the committee had prepared for a future EEO committee meeting with an agency employee.

The Authority held that the employees were engaged in protected activities in the context of performing their roles as members of the EEO Advisory Committee, and that the agency's actions were coercive in nature and interfered with the employees' protected activities in violation of Section 19(a)(1) of the Order. The agency was ordered to cease and desist from such actions in the future. *(4 FLRA No. 87—November 12, 1980)*

The Federal Service Impasses Panel has taken a number of actions in recent weeks to assist Federal agencies and their labor organizations in the resolution of negotiation impasses.

In two cases the Panel determined that voluntary efforts had not been exhausted and directed the parties to resume negotiations with mediation assistance as necessary:

- Treasury, Corpus Christi Army Depot, Corpus Christi, Texas and International Association of Machinists Lodge 2049 *(Case No. 80 FSIP 71, September 30, 1980).*
- Office of Personnel Management, Washington, D.C. and American Federation of Government Employees Local 32 *(Case No. 80 FSIP 72, September 30, 1980).*

The Panel permitted requests for its assistance to be withdrawn in these two cases:

- General Services Administration, National Archives and Records Service, Washington, D.C. AFGE Local 2578 *(Case No. 80 FSIP 58, October 2, 1980).*
- Veterans Administration Medical Center, Minneapolis, Minnesota and AFGE Local 3669 *(Case No. 80 FSIP 13(a), September 30, 1980).*

In Department of Health and Human Services, Social Security Administration, Chicago, Illinois and AFGE Local 1395, the Panel was administratively advised that a settlement had been reached *(Case No. 80 FSIP 73, September 30, 1980).*

The Panel directed the parties in two impasses to resume negotiations for 30 days with mediation assistance as necessary. When advised at the end of this period that the disputes remained unsolved, FSIP ordered the parties to submit the issues to outside arbitration with the fees and expenses of the arbitrator to be shared equally:

- ACTION, Washington D.C. and ACTION Employees Union *(Case No. 80 FSIP 50, October 8, 1980).*
- GSA, Region II, New York, New York and AFGE Council 206 *(Case No. 79 FSIP 102, October 16, 1980).*

The union sought Panel assistance on an issue for which the Panel had previously declined jurisdiction. The Panel reaffirmed its earlier decision—Army, Fort Sill, Oklahoma and National Federation of Federal Employees Local 273 *(Case No. 80 FSIP 48(a), October 8, 1980).*

Following a factfinding hearing, the Panel issued a decision and order in a dispute on hours of work and official time for union representatives. In each instance it adopted the employer's proposal—U.S. Army Materiel Development and Readiness Command, Alexandria, Virginia and NFFE Local 1332 *(Case No. 80 FSIP 9, October 6, 1980).*

In another case the Panel directed the parties to adopt the Union's proposals with respect to reimbursing exempt employees, reserved parking space, and third-party cooperation; and the employer's proposals with respect to changing shifts to avoid the parking fee exemption and shift changes to facilitate carpooling—GSA, National Capital Region, Washington, D.C. and AFGE Local 2456 *(Case No. 80 FSIP 56, October 15, 1980).*

Dear Subscriber,

This issue closes out Volume 80 of The Consultant. Volume 81 will begin with the next issue on January 16, 1981. Meanwhile, all of us extend to you and yours our

Season's Greetings

AND BEST WISHES FOR CONTINUED SUCCESS THROUGHOUT THE NEW YEAR

...the Editor

(Continued from page 1)

process. *(4 FLRA No. 86—November 12, 1980)*

Panel Explains Resolution Procedures

A guide issued recently by the Federal Service Impasses Panel outlines the variety of procedures it uses to resolve bargaining disputes. Its strategies, the Panel believes, shorten the time span in which Federal sector impasses are resolved. Moreover, the parties' uncertainty as to which procedure FSIP will employ encourages voluntary settlement.

The Federal Service Labor-Management Relations Statute gives the Panel unusually broad authority to resolve impasses. Under section 7119 FSIP can recommend procedures or assist the parties through any method it deems appropriate, including binding arbitration by the Panel or an outside arbitrator.

Each of the nine procedures listed in the guide is explained in detail:

1. Resumption of negotiations
2. Resumption of negotiations with mediation assistance
3. Resolution of negotiability issues
4. Factfinding followed by recommendations
5. Factfinding followed by a decision and order
6. Written submissions followed by recommendations or decision
7. Outside arbitration
8. Final-offer selection
9. "Med-arb"

Under Resumption of Negotiations, for example, the Panel explains that this procedure is ordered when the parties have not exhausted voluntary efforts to reach agreement and further bargaining may resolve the dispute or narrow the issues. In such cases FSIP usually declines to assert jurisdiction, but without prejudice to the parties' rights to request assistance at a later time. Sometimes, however, the Panel will decide the merits of certain issues and return other issues to the parties for further negotiations.

"A Guide to the Dispute Resolution Procedures Used by the Federal Service Impasses Panel" is available from FSIP, Suite 209, 1730 K Street, N.W., Washington, D.C. 20006.

Consultant

Published biweekly by the U.S. Office of Personnel Management. Editorial inquiries should be addressed to Editor, The Consultant, Office of Labor-Management Relations, Room 7588, 1900 E Street, N.W., Washington, D.C. 20415. Phone (202) 632-9722.

All Federal departments and agency headquarters may order the Federal Labor-Management Consultant by sending a printing and binding requisition to the Government Printing Office, referencing OPM printing requisition No. 80-94. Individuals may subscribe through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402, at $18.00 per year ($20.00 foreign). Make checks payable to the Superintendent of Documents.

Unless otherwise specified, materials in this publication do not represent expression of official policy. Section numbers cited are taken from Title V, U.S. Code, Part III, Subpart F, Chapter 71, Subchapter I—IV. Use of funds for printing this publication has been approved by the Office of Management and Budget through June 30, 1984.

best copy available